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Capital Punishment in South Asia (India, Pakistan and Bangladesh): A Legal Analysis

A thesis submitted to Middlesex University in partial fulfilment of
the requirements for the degree of Doctor of Philosophy

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Glossary

Diyat	blood money for bodily injuries or death
Hadd	punishment for offences for which limits have been defined in the Quran and Sunnah
Haraba	crime of brigandage
Qatal	Homicide
Qadhf	False accusation of unchastity
Qazi/qadi	judge
Qisas	equality, retribution,
Shariah/shariat	Islamic Law
Sunnah	practices of the prophet Muhammad
Tazir	a class of criminal penalties that are defined by the state
Ulema	scholars of Islamic religion and Law
Wali	guardian

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Chapter 1

Capital Punishment in South Asia: A Legal Analysis

1.1 Abstract

Despite the inexorable global trend towards abolition, India, Pakistan and Bangladesh have not embraced the abolitionist movement and still fail to accept capital punishment as a human rights issue. The application of capital punishment in the Indian subcontinent is not only a violation of international human rights law but is also contradictory to the domestic constitutional provisions that guarantee the right to life, the right to a fair trial and the prohibition of torture. This research identifies the glaring gaps in the substantive and procedural laws of these countries that lead to arbitrary application of the death penalty. Law Commissions' reports and the case law of these countries reflect: the investigating agencies use torture to extract confession; the indigent accused facing capital charges do not get legal assistance at the state's expense; and issues related to witnesses cause undue delay in criminal proceedings and an escape route to terrorist and the powerful from prosecution. Simultaneously, the special courts have heightened the risk of arbitrary and subjective application of capital punishment by adopting special procedures that lower fair trial standards and due process guarantees. These special procedures include special powers of arrest and detention, validity to confessions made under police custody and reversing the presumption of innocence. The thesis explains that the scope of capital punishment as enunciated in the primary sources of Islamic jurisprudence (the Quran and the Sunnah) is not only limited but is also entwined with stringent evidentiary requirements and due process guarantees. It helps to dispel the notion that *sharia* is an impediment to restrict the scope of the application of capital punishment in Pakistan. This dissertation explores the legal and physical problems of one third of the world's death row prisoners who have been languishing in cells for many years under the conditions of solitary confinement in contravention to guidelines of the domestic courts and law commissions. The pain of death row in the Indian subcontinent is exacerbated due to the denial of fundamental rights to prisoners in the name of safekeeping. As part of a comprehensive approach, the research provides compelling legal grounds to strengthen the criminal justice system by focusing on the process of

evidence and investigation in order to prosecute the powerful and terrorists to promote justice rather than revenge.

1.2 Background

This research topic is important on three levels: international, regional and the researcher's personal career.

Sangmin Bae writes: 'Punishing people with death has a history as old as society itself, and it was not considered a human rights violation until the last decades of the twentieth century'.¹ It is usually believed that the modern abolition movement emerged in Europe with the Cesare Beccaria's treatise *Dei delitti et delle pene*, (On Crimes and Punishment).² Capital Punishment, Beccaria declared, was both inhuman and ineffective: 'an unacceptable weapon for a modern enlightened state to employ and less effective than the certainty of imprisonment'.³ The abolitionist movement grew during the nineteenth century rallying the support of such important English jurists such as Jeremy Bentham and Samuel Romilly.⁴ After the Second World War, the subject of international human rights gained prominence and reinforced the abolition movement on the ground of two fundamental human rights norms, the right to life and the protection against cruel, inhuman and degrading punishments.⁵ These two rights have been enshrined in two fundamental international human rights instruments: the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁶

Over the past few decades, the abolition movement has gained momentum across the globe. Roger Hood explains: 'The recognition of the death penalty as a human rights issue, combined with the development of international human rights law and the political weight that has been given to the campaign led by European institutions to get rid of capital punishment completely, is the main explanation for the surge in

¹ Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment* (Albany: State University of New York Press, 2008), p.1.

² Cesare Beccaria, *An Essay On Crimes and Punishments* (Albany: W.C. Little, 1872), pp.51-55.

³ Ibid, p.54.

⁴ Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: The Movement for Reform, 1750-1833 (Vol. 1)* (Oxford: Macmillan, 1948), pp.389-91.

⁵ William A. Schabas, 'International Legal Aspects' in Hodgkinson, P. & Rutherford, A. (eds.) *Capital Punishment: Global Issues and Prospects Volume II* (Winchester: Waterside Press, 1996), pp.17-44, p.18.

⁶ Universal Declaration of Human Rights (adopted 10 December 1948) U NGA Res 217 A (III) (UDHR), arts.3, 5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6(1), arts 6, 7.

abolition over the past quarter of a century’.⁷ Another major development in the abolition movement at the dawn of the twenty-first century was the Rome Statute of International Criminal Court which currently has 124 States Parties⁸. This Statute excludes the death penalty from the punishments which the International Criminal Court is authorized to impose,⁹ despite the court’s jurisdiction over extremely grave crimes such as crimes against humanity, genocide and war crimes. William Schabas considers this development as ‘a significant benchmark in an unquestionable trend towards universal abolition of capital punishment’.¹⁰

According to the Report of the UN Secretary General ‘more than 150 of the 193 Member States of the United Nations have abolished the death penalty or introduced a moratorium, either in law or in practice’.¹¹ The report also endorses the fact that ‘the international community as a whole is moving towards the abolition of the death penalty in law or practice’.¹² The publication of the United Nations Human Rights Office of the High Commissioner shows the trend towards the abolition of the death penalty and it recorded that only 22 countries implemented executions in 2015.¹³ Since 2007, the General Assembly in a series of its five resolutions adopted in 2007,¹⁴ 2008,¹⁵ 2010,¹⁶ 2012¹⁷ and 2014¹⁸ respectively, calls for international moratorium on the executions. On November 19, 2016, the General Assembly passed its sixth resolution for moratorium on capital punishment.¹⁹ A total of 115 countries supported

⁷ Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2008), p. 31.

⁸ ICC, <https://asp.iccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 24 December, 2016.

⁹ Rome Statute, Article 77(1)

¹⁰ William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002), p. 258.

¹¹ Question of the Death Penalty, (1 July 2013) UN Doc A/HRC/24/18, p.4

¹² Ibid, p.1.

¹³ Ivan Simonovic, *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York: United Nations Human Rights Office of the High Commissioner, 2015), p.282.

¹⁴ Moratorium on the Use of the Death Penalty, UNGA Res/62/149(14 Dec 2007) (adopted by 104 votes to 49; 31 abstentions)

¹⁵ Moratorium on the Use of the Death Penalty, UNGA Res/63/168(18 Dec 2008) (adopted by 106 votes to 48; 34 abstentions)

¹⁶ Moratorium on the Use of the Death Penalty, UNGA Res/65/206 (21 Dec 2010) (adopted by 109 votes to 41; 35 abstentions)

¹⁷ Moratorium on the Use of the Death Penalty, UNGA Res/ 67/176 (20 Dec 2012) (adopted by 111 votes to 41; 34 abstentions)

¹⁸ Moratorium on the Use of the Death Penalty, UNGA/Res/69/186 (18 December 2014) (adopted by 117 votes to 38; 34 abstentions)

¹⁹ UNGA, 71st Session, [Recorded Vote on A/C.3/71/L.27 Moratorium on the Use of the Death Penalty](http://www.un.org/en/ga/third/71/docs/voting_sheets/L.27.pdf), Nov. 17, 2016 <http://www.un.org/en/ga/third/71/docs/voting_sheets/L.27.pdf> accessed on 24 December 2017.

the resolution, 38 countries voted against and 31 abstained.²⁰ The annual report of Amnesty International on 'Death Sentences and Executions 2015' reflects that 102 countries have abolished the death penalty for all crimes whereas this figure was only 16 in 1974.²¹ It is obvious that the world is moving away from the death penalty. In this context, there are two compelling reasons why the debate on capital punishment in India, Pakistan and Bangladesh is important.

Firstly, India, Pakistan and Bangladesh still retain capital punishment. In these three countries the persons charged with certain crimes are not only sentenced to death but also executed. India, Pakistan and Bangladesh always voted against UN General Assembly resolutions on moratorium on the use of the death penalty. According to Amnesty International, Pakistan and Bangladesh are among those countries in the world where the most people were sentenced to death during the year 2014.²² The report further reveals that these three countries are included in the list of 22 countries of the world that carry out executions.²³ There is no official data or statistics on the executions in India, Pakistan, and Bangladesh. The data collected by international and national human rights organizations including Reprieve, Amnesty International, The Death Penalty Project and the Human Rights Commission of Pakistan reflects that the year 2015 saw the execution of 326 persons and 332 since the end of a six year moratorium on executions in December 11, 2014.²⁴ On the contrary, India and Bangladesh have executed one person each in 2015. The dream of abolition of capital punishment across all the jurisdictions in the world is difficult to achieve without making the most populous region of the world to realize that the death penalty is an inhuman and degrading punishment as well as a violation of human rights.

Secondly, the discourse's global dimension shows that almost one third of the world's population of death row prisoners is confined in various prisons in Pakistan, India and Bangladesh. Some of these death row prisoners have been sentenced to death charged

²⁰ General Assembly of the United Nations, <<http://www.un.org/en/ga/69/resolutions.shtml>> accessed on 8 September 2016.

²¹ Amnesty International, *Death Sentences and Execution in 2015* (London: Amnesty International, 2016), p.4.

²² Amnesty International, *Death Sentences and Execution in 2014* (London: Amnesty International, 2014), p.6.

²³ Ibid, p.5.

²⁴ Death Penalty Worldwide, <<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Pakistan>> accessed on 8 September 2015; Amnesty International, *Death Sentences and Execution in 2015*(London: Amnesty International, 2016), p.6.

with various non-lethal offences in violation to article 6(2) of the International Covenant on Civil and Political Rights. Furthermore, the mental agony of the death row prisoners, languishing in overcrowded prison cells for many years, is intensified in the absence of an effective mechanism of legal aid at the state's expense and the hard physical conditions of living in prison.

At the regional level, despite the diversity in South Asia, India, Pakistan and Bangladesh not only share common historical similarities in constitutional and statutory texts as former British colonies but also common stance on the application of capital punishment to combat terrorism and heinous crimes. In the name of security and the war on terrorism, these three countries have been applying capital punishment in the special courts constituted under special laws that bypass the under resourced and inefficient criminal justice systems in order to combat terrorism and other heinous offences. These extraordinary measures to counter terrorism have multiplied the risk of arbitrary application of the death penalty because special laws lower the general standards of due process and provide special powers of arrest and detention, validity to confession under police custody and reverse the presumption of innocence- the accused is guilty until his/her innocence is proven.

In addition to terrorism, these countries have enacted special legislation to stem heinous crimes like gang rape and acid throwing. On the night of 16 December 2012, a brutal gang rape took place in a moving bus on the streets of Delhi. It was a crime that sparked nationwide protests and forced the government into enacting a stringent anti-rape law that prescribes nonfatal rape as liable to capital punishment.²⁵ Similarly, to curb a rise in acid attacks on women, the Bangladeshi Government enacted the Acid Crime Control Act in 2002. Under the law the alleged attackers may be tried by special tribunals and may face a maximum penalty of death.²⁶

In addition to special courts, military courts in Pakistan have multiplied the risk of arbitrary application of the death penalty. Pakistan lifted a six-year long moratorium on civilian executions and established military courts as part of the National Action Plan against terrorism in the wake of the horrific attack by Taliban terrorists on Army Public School Peshawar on 16 December, 2014 that claimed 145 lives, including 132

²⁵ The Criminal Law(Amendment), Act, No.13 of 2013, sec. 376(A).

²⁶ Bangladesh Acid Crime Control Act, Act No.2 of 2002, sects. 4 & 5(a).

school children. The 21st Constitutional Amendment amended Article 175 of the Constitution of Pakistan 1973 to provide military courts with justification, for a period of two years, to try civilians for terrorism related offences.²⁷ According to the Pakistan Army's press wing, 11 military courts convicted 274 persons on the ground of confession before the magistrate and the trial court- 161 out of the 274 convicted persons were awarded death sentences.²⁸

There is also a deeply personal reason for choosing this topic of research. This project was conceived during my time working as Superintendent of Jail (Prison Governor) at District Jail Sheikhupura, State of Punjab, Pakistan. I witnessed the physical hardships of the death row prisoners faced while confined in cell blocks, 8 to 11 inmates in each cell, during the hot weather. Upon perusal of the judicial record, I came to know that there were more than 70 death row prisoners whose appeals were pending in the Lahore High Court for more than seven years. During my two-year deployment as a Corrections Advisor at the United Nations Mission in Liberia, I also witnessed the legal and physical problems of prisoners under the sentence of death confined in Monrovia Central Prisons, Monrovia. Working as Chief Executive officer in four different prisons in Pakistan over 10 years, I had to supervise the executions of 7 prisoners to discharge my duties. In addition to the pain and miseries of the death row prisoners and their families and friends, I can understand the stress and strain on prisons staff due the execution process.

This research broadened my knowledge of the criminal justice system, penology and human rights law. Through this research I will be able to contribute to the humane working of criminal justice systems in accordance with international human rights standards either working as an important functionary of the Pakistan criminal justice system or through a possible assignment in the rule of law, Department of Peacekeeping Operation, in the United Nations.

²⁷ Constitution (Twenty First Amendment) Act, 2015, sec.2.

²⁸ Inter-Services Public Relations, Press Release No.PR2/2017-ISPR, (31 December 2016) available on <https://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=3659> accessed on 3 January, 2017.

1.3 The Statement of Research Aims

- (1) To analyze the issues that have affected the criminal justice systems of India, Pakistan, and Bangladesh since Ancient India and also lead to the arbitrary and discriminatory application of capital punishment.
- (2) To explore how capital punishment in the Indian subcontinent is a violation of International Human Rights law. It will identify the areas of the criminal justice systems that are not in consonance with international legal frameworks on the protection of rights of those who are facing the death penalty. These countries are required in order to achieve greater conformity with contemporary international norms and the obligations of state parties to the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child. In this regard, the scope of the death penalty needs to be reduced, mandatory death sentences need to be abolished, and procedural guarantees in the trial and appeal processes need to be ensured.
- (3) To evaluate the risk of arbitrary application of the death penalty in India, Pakistan and Bangladesh under special courts, and military courts to counter terrorism, heinous crimes and religious militancy.
- (4) To investigate the status of capital punishment under Sharia and why the Quran and Sunnah are related to regulate capital punishment in Pakistan. Further, to answer the question of whether Shariah is an obstacle or a pretext against restricting or abolishing the death penalty in Pakistan.
- (5) This research aims to explore the legal and physical problems of one third of the death row population of the world confined in overcrowded prisons of these countries. The death row phenomenon has become a complicated issue due to an increase in its number each year, the pendency of cases in appellate courts and the miserable living conditions in overcrowded prisons cells. The death row inmates in India, Pakistan and Bangladesh, are confined for up to twenty-two hours a day in cells measuring 6 feet by 8 feet. Having been segregated from the general prisons population, they are only allowed restricted family visits and a limited access to educational, recreational and treatment facilities.

1.4 Reasoned Description of Proposed Research Methods

The research employed socio-legal theory and critical legal theory of law. The socio-legal aspect of the issue is very important. With the help of socio-legal theory, the thesis envisages to understand the norms and values of society that have a profound influence on country's legislation. As Emile Durkheim says 'law is an index of a social formation'.²⁹ In South Asia, the tradition of avenge is embedded in the fabric of the society, the family feud is a cherished value and the practice of honor killing is very common. The socio-legal approach analyzed how these countries' governments make special legislation to incorporate capital punishment for various offences.

The critical legal theory questions the absolute finality of the traditional jurisprudence and 'it describes law as a weapon of the powerful to execute the poor'.³⁰ The protagonists of the abolition movement argue that the death penalty is a manifestation of the power of the state. The powerful elite's influence on the police work and functionality is usually criticized by human rights organizations, the media and some political leaders of these countries. The critical legal theory, as a research approach, help explain how the trial process in 'the criminal justice system is unable to prosecute the powerful'.³¹

Prisons Statistics

There is no official data or statistics regarding executions in India, Pakistan, and Bangladesh. The prisons are administered by the province or the state in India and Pakistan. The Inspectorate/Directorate of Prisons in each state/province maintains the record of the number of executions conducted each year but this is not published. In the absence of official data, this research has relied on the figures collected by different national and international NGOs working on the subject of the death penalty.

The Ministry of Interior in Pakistan and the National Crime Records Bureau, Ministry of Home Affairs, India, publish prison population figures including the number of prisoners held under sentence of death. The official website 'Bangladesh Jail' does not reflect the number of prisoners under the sentence of death.³² The researcher used

²⁹ Emile Durkheim, *The Division of Labor in Society*, translated from the French edition of 1893 by W D Halls (London: Palgrave Macmillan, 1984), p.52.

³⁰ Richard Quinney, *The Social Reality of Crime* (Boston: Little & Brown, 1970), p.27.

³¹ Larry J. Siegel, *Criminology: Theories, Patterns & Typologies* (Belmont, CA: Wadsworth/ Cengage Learning, 2013), p.266.

³² Bangladesh Jail < <http://www.prison.gov.bd> > accessed on 2 January, 2017

the statistics compiled by Odikar, The Death Penalty Project and Amnesty International on death row prisoners confined in various prisons in Bangladesh. In India, Centre on the Death Penalty, established at National Law University in August 2014, is an important source of information regarding the death row prisoners. The Centre is an extension of the Death Penalty Research Project at National Law University Delhi that interviewed death row prisoners 5 confined in various prisons in India between June 2013 and January 2015.³³

1.5 Original Contribution

Capital punishment is a vast topic that has attracted the attention of a host of scholars in other parts of the world but this debate is relatively new in South Asia and not much research has been conducted on the topic. In South Asia there is no criminologist or author like Cesare Beccaria in Europe who wrote *On Crimes and Punishment* and vehemently opposed capital punishment. In India, some valuable books and reports have been published on capital punishment. In the case of Bangladesh and Pakistan, no research has been published or conducted on capital punishment except for the reports of National and International NGO's working for the abolition of the death penalty in these countries.

In 2008, Amnesty International published 'Lethal Lottery' which analyzed Indian Supreme Court Judgments from 1950 to 2006.³⁴ This report is a great contribution, exposing the vagaries of judicial arbitrariness in imposing the death penalty in India. In 2013, Professor Roger Hood and Surya Deva edited *Confronting Capital Punishment in Asia*. Three out of fourteen chapters of the book discuss the issue of the death penalty in India.³⁵ In one of the chapters, Bindal and Raj Kumar discuss the legal, constitutional and human rights dimension on the abolition of the death penalty.³⁶ Deva provides a critique on the doctrine of 'rarest of rare' by analyzing 86 cases (January 2000 to October 2011) decided by the Indian Supreme Court. He

³³ Centre on the Death Penalty, National law University Delhi < <http://www.deathpenaltyindia.com/clinic/> > accessed on 30 December, 2016.

³⁴ Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry), *Lethal Lottery: The Death Penalty in India-A Study of Supreme Court Judgments in Death Penalty Cases (1950-2006)* (London: Amnesty International, 2008).

³⁵ Roger Hood & Surya Deva, *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford: Oxford University Press, 2013)

³⁶ Amit Bindal and C Raj Kumar, Abolition of Death Penalty in India: Legal, Constitutional, and Human Rights Dimensions in Roger Hood & Surya Deva (eds.) *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (Oxford: Oxford University Press, 2013).

concludes that the principle of awarding the death sentence in the ‘rarest of rare’ case has outlived its utility and that the application of Bachan Singh’s rarest of rare guidelines is applied quite inconsistently and arbitrarily.

On the death row phenomenon in India, *Prisoners Voices from Death Row: Indian Experience*, empirical research based upon the interviews of 111 death row prisoners confined in 16 prisons from six federal states and their families, exposes inhuman and degrading treatment of the death row prisoners.³⁷ In the context of Pakistan, Isabel Buchanan’s *Trials: On Death Row in Pakistan* is the first book on the issue of death row in Pakistan. Buchanan, a twenty-three years old Scottish lawyer, explores the miseries of death row and flaws of the criminal justice system through her death row cases while working with national NGO, Justice Project Pakistan. The book is a beautiful narrative of her personal experience but not a formal research on the death penalty in Pakistan.

This thesis is the first research on capital punishment that covers the jurisdiction of three countries India, Pakistan, and Bangladesh. By tracing the common legal history, common provisions under the penal laws (Indian Penal Code 1860, the Code of Criminal Procedure 1898, the Evidence Act 1872 and the Prison Act, 1898), the thesis evaluates the legal and constitutional issues surrounding capital punishment in these countries.

The research also covers the status of the death penalty in Sharia and its application in Pakistan. The thesis explains that the scope of capital punishment in the Quran and the Sunnah is very limited as it is generally misunderstood. It helps to dispel the notion that Shariah is an impediment to restrict or abolish capital punishment in Pakistan.

1.6 Structure of the Thesis

The dissertation has been divided into eight (8) chapters. Chapter 1 includes the following content: abstract, background, significance of research, research methods, originality and structure. Chapter 2 provides the historical overview of capital punishment in South Asia. Furthermore, this chapter, comprising of three parts, evaluates the criminal justice system especially focusing on capital punishment

³⁷ Reena Mary George, *Prisoner Voices from Death Row: Indian Experience* (Farnham: Ashgate, 2015).

prevalent during the three important phases of history of South Asia namely Ancient India, Medieval India and British India. Owing to lack of knowledge of the day-to-day administration of the ancient Indian Kingdom, the thesis has gleaned information from religious texts and travel accounts of early Greek, Chinese and Muslims travelers. The first part of the chapter articulates the caste system in the society and its impact upon the system of crime and punishment especially on the death penalty. Further, it also discusses the philosophy of severe punishment (*danda*) embedded in ancient religious text. The second part of the chapter explores the roots of the Islamic Criminal Justice System in the region especially the law of murder (Qisas and Diyat). Despite Muslim rulers' claims of adhering to the high values of justice as enunciated in Islam, in many cases they imposed capital punishment in ways that were wholly opposed to the spirit of the Sharia. The third part of the chapter helps to understand common historical similarities in constitutional and statutory texts of South Asian countries as former British colonies. The second chapter contributes to knowledge by investigating the origin of four major issues that still affects the criminal justice system namely the use of torture to extract confession, a system of punishment based upon caste and creed, the Islamic law of murder, and the use of prisons as the chief form of punishment.

Chapter 3 explains the legal rationale for the emergence of capital punishment as a violation of human rights under international law. The chapter further enumerates the treaty obligations of India, Pakistan and Bangladesh as states parties to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child regarding the application of the death penalty. The reports of the Committee on the Rights of the Child(CRC) and the Universal Periodic Reviews of these countries in the Human Rights Council call on these countries to comply with their treaty obligations regarding the application of the death penalty. In Chapter 4, a complete analysis of the process of capital trials demonstrates that due process is simply not followed, and there is no due diligence in the process of evidence collection, access to legal counsel and independent witnesses. The reports of law commissions, police commissions, and national and international NGO's reveal that investigating agencies frequently use torture to extract confessions. The study of the relevant case law reveals that the courts' guidelines on custodial accountability could not change the practices of torture to extract confession.

Chapter 5 shows how special laws in these three countries have heightened the risk of arbitrary and subjective application of capital punishment by lowering the recognized standards of due process through special procedures. It has identified the glaring flaws such as confessions made to the police are admissible as evidence, there are insufficient safeguards for the principles of presumption of innocence, and there is incommunicado detention of the accused or restricted communication with legal counsel and relatives.

Chapter 6 defines with the status and scope of capital punishment under Sharia (The Quran and the Sunnah) and its application in Pakistan. In this regard, research relies on the basic sources of Islamic Jurisprudence (the Quran and Sunnah). In order to examine the effects of grafting the Qisas and Diyat Law 1997 into secular penal laws of the country on the prosecution of the offence of murder, the research analyzed reported cases of the High Courts and the Supreme Courts.

Chapter 7 explores death row prisoners' mental anguish and suffering due to protracted periods on death row coupled with de facto solitary confinement under harsh physical conditions of life in the overcrowded prisons of India, Pakistan and Bangladesh. In the absence of an independent monitoring mechanism, it is not less than a herculean task to know the legal and physical problems of death row prisoners confined in various prisons in India, Pakistan and Bangladesh. The case law and the reports of law commissions in these countries portray the situation of solitary confinement and physical hardships of life on death row.

Chapter 8 concludes with two suggested topics to conduct further research.

Chapter 2

Historical Overview of Capital Punishment in South Asia

Before going into the substance of the chapter it is essential to define the term ‘South Asia’.

Definition of South Asia

South Asia, Indian Sub continent and India are in origin geographical expressions that connote, taken in its widest sense, for all the contiguous territories in Asia, which were directly or indirectly subject to British rule, lies between 8 and 37 north latitude, and 66 and 99 east longitude. The term India for the region is of much older origin and South Asia is a relatively new term that may be ‘unfamiliar but it is neutral and inoffensive’¹ South Asia is a more recent construction-only six decades old- which today according to the United Nations geographical region classification² encompasses eight very diverse sovereign states of very different sizes: India, Pakistan, Bangladesh, Sri Lanka, Nepal, Afghanistan, Bhutan and the Maldives. Since 1985, these eight countries are working under the banner of a regional organization named the South Asian Association for the Regional Cooperation (SAARC) which aims ‘to promote the welfare of the people of south Asia’.³ In this dissertation, the term South Asia has been treated under the dictates of international and regional classification

Introduction

This chapter, comprising of three parts, evaluates the criminal justice system especially focusing on capital punishment prevalent during the three important phases of history of South Asia namely ancient India, medieval India and British India. It is pertinent to mention that ‘South Asia not only carries the weight of its people, 23 percent of the world population, but also of their ancient history stretching back five

¹ Bertram Hughes Farmer, *An Introduction to South Asia* (London: Methuen, 1983), p.1

² ‘United Nations Geoscheme’ <<http://millenniumindicators.un.org/unsd/methods/m49/m49regin.htm>> accessed 8 April 2014.

³ The South Asian Association for Regional Cooperation, Charter, Article 1.

millennia'.⁴ From Aryan to British rule the region saw the rise and fall of various indigenous and foreign rulers that had left profound footprints on the civilization and system of administration. Henry Beveridge has reflected in these words:

Wave upon wave, the sea of hostile invasion has inundated the land. Its capitals have been shaken by revolution time and again; new rulers have risen in sudden strength and old dynasties have disappeared as dew before the sun.⁵

The first part of the chapter traces the origin of caste system in the society and its impact upon the system of crime and punishment especially on the death penalty. Further, it also reveals the philosophy of severe punishment (*danda*). The second part of the chapter explores the roots of Islamic Criminal Justice system in the region especially the law of Murder Qisas and Diyat Law. The third part of the chapter helps to understand common historical similarities in constitutional and statutory texts of South Asian countries as former British colonies. One of the lasting legacies of the British rule is the Indian Penal Code 1860 that introduced system of courts, prisons and punishments. India benefited from early 'progressive experiments with judicial discretion in capital cases, and since the early colonial period judges were permitted to substitute life imprisonment or banishment to a penal colony in place of Death'.⁶

2.1 Capital Punishment in Ancient India

One of the major challenges in studying the criminal justice system in ancient India is the lack of original written sources to undertake a comprehensive analysis of the contemporary legal and political system. According to Professor A. L Basham, School of Oriental and African Studies, University of London:

We have for ancient India no lengthy theoretical texts on political philosophy comparable to Plato's Republic and the same time our knowledge of the day to day administration of ancient Indian Kingdom is lamentably inadequate. Hence, theoretical texts have too often been used as evidence of practice, and

⁴ Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture. Political Economy* (London: Routledge, 2004), pp.3-4.

⁵ Henry Beveridge, *A Comprehensive History of India, Civil, Military, and Social, from the First Landing of the English to the Suppression of the Sepoy Revolt: Including an Outline of the Early History of Hindoostan, Vol 1* (London: Blackie and Son, 1862), p. 3.

⁶ David Skuy 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1988) 32(03) *Modern Asian Studies* 513, pp. 526-27.

sometimes an underlying theory has been wrongly inferred from what evidence we have on governmental institutions.⁷

Most of the classical texts, many of whose authors are anonymous or of doubtful identity were transferred from one generation to another and teacher to student by oral tradition. Drapkin calls the authenticity of available texts in question in these words, 'the oral recitation through many generations undoubtedly changed and reshaped the original, and the resulting texts were recorded centuries after their oral circulation'.⁸

Simultaneously 'chronologically accurate records for early Indian history are evidently lacking'.⁹ The majority of dates in Indian history have been established upon the evidence of early Greek and Chinese travelers and later Muslim merchants, Buddhist pilgrims and European writer.

In this backdrop, 'Indian history prior to the twelfth century A.D. had to be compiled from scattered allusions in religious and literary works'.¹⁰ Indian history is inexorably linked with the religion. Consequently, historians divide the age into four periods based upon the specific religious beliefs: the Vedic, Brahminic, Buddhist, and New Brahmanic (Hinduism). The date of the Vedic literature cannot be fixed with accuracy.¹¹ The Vedic age, from about 1500 to 600 BC was based on the great religious encyclopedia known as the Vedas. Subsequently this Vedic literature became the origin of the teachings of New Brahminism (Hinduism).

Two religions namely Buddhism and Hinduism were significantly influential in shaping the administrative and legal systems in ancient India.

⁷ Johan W. Spellman, *Political Theory of Ancient India: A Study of Kingship from the Earliest Times to Circa A.D.300* (Oxford: Clarendon Press, 1964), p. viii.

⁸ Israel Drapkin, *Crime and Punishment in the Ancient World* (New York: Lexington Books, 1989), p. 99.

⁹ D.N. Tripathi, 'Archaeology and the Date of Buddha' in D. P. Chattopadhyaya (eds.), *History of Science, Philosophy and Culture in Indian Civilization, Volume VII, Part 9* (New Delhi: Centre for Studies in Civilizations, 2013), p. 33.

¹⁰ Israel Drapkin (n 8), p. 99.

¹¹ Rakhal Das Banerji, *Prehistoric, Ancient and Hindu India* (London: Blackie and Son, 1934), p. 44.

Buddhism

Buddhism originated in India in the sixth century BCE but did not reach its peak until between the second century BCE and the second Century AD.¹² Buddhism was born out of the teachings of a man named Siddhartha Gautama, who later became known as Buddha. The majority of historians of India consider the year 563 BC as being the birth year of Buddha and also the earliest assured date in Indian history.¹³ Buddha's teachings were recorded in Pali (पालि),¹⁴ Indian literary language, during the first century BC. The entire collection of Buddha's teachings, or Tipitaka, consisted of three sections: 'the Sutta'(dhamma), the Vinaya(the rules of discipline) and the Adhidhamma.¹⁵ Buddha did not claim that he created the world. Rather, Buddha taught individuals 'to rediscover the universal law of nature (Dhamma) and consequently to relieve their own suffering (Duhkha)'.¹⁶

2.1.2 Buddhism and System of Punishments

The doctrine of Buddhism is not a system of philosophy in the western sense, but is rather a path towards enlightenment. It does not propose a specific system of government or legal administration. In the light of Buddhist teachings, 'cruelty, torture, revenge in meeting out punishment or as a deterrent to crime possesses a limited impact on the spread or growth of crime'.¹⁷ Punishment was never 'retaliatory', it was always meant to act as a 'method for cleansing the soul through mental or physical suffering'.¹⁸ Buddhists would favor rehabilitation using the path to enlightenment, which would enable even the most dangerous convicted killer to find his or her Buddha-nature.¹⁹ During the Buddhist age, confessions played an important

¹² Rita James Simon and Dagny A. Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over* (New York: Lexington Books, 2007), p. 10.

¹³ D.N. Tripathi, (n 9), p. 19.

¹⁴ Edward Conze, *A Short History of Buddhism* (Sydney: George Allen & Unwin, 1980), p. 17.

¹⁵ Edward J. Thomas, *The History of Buddhist Thought* (London: Kegan Paul, Trench, Trubner & Co., 1933), pp. 265-268.

¹⁶ Ramakrishna Puligandla, 'Pratitya-saamutpada and Creativity' in Ramakrishna Puligandla and David Lee Miller (eds.), *Buddhism and Emerging World Civilization: Essays in Honor of Nolan Pliny Jacobson* (Carbondale: Southern Illinois University Press, 1995), pp.125-136, p.126.

¹⁷ Nandasena Ratnapala, *Crime and Punishment in the Buddhist Tradition* (New Delhi: Mittal Publications, 1993), p. 11.

¹⁸ Rita James Simon and Dagny A. Blaskovich (n 12), p.11.

¹⁹ Damien P. Horgan, 'Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty' (1996) 41 *American Journal of Jurisprudence* 271, p. 280.

role in determining punishments and those individuals who confessed to their crimes usually received less punishment.

Capital Punishment and Buddhism

Buddha never spoke on the issue of the death penalty but if we evaluate it in perspective of the “Five Precepts” or training rules- all individuals must abstain from taking a life, taking what is not given, sexual misconduct, false speech, and intoxicants. Some authors have noted that ‘the first precept restrains Buddhists from killing any living being, and the death penalty would be inconsistent with this belief’.²⁰ Buddhism preaches non-violence and peace. Verse 130 under Canto X of the Dhammapada, one of the most widely read and best known Buddhist scriptures, prohibits killing, upamam katva na haneyya na ghataye ‘one should neither slay nor cause to slay’.²¹

Banerji maintains that ‘the religion of Buddha does not appear to have made much impression on the ruling class or the nobles during his life time’.²² 218 years after Buddha’s death, the people of South Asia had good reason to bless the name of Bhudda, ‘when one of their most bloodthirsty kings, Ashoka, a fratricide and the wanton slayer of thousands of his subjects, embraced Buddhism, and became as mild and peaceful a monarch as he had formerly been cruel and reckless’.²³ Amongst other things, Ashoka greatly ‘restricted the use of capital punishment’ as part of his emphasis on non-violence (ahimsa) making his kingdom ‘one of the first jurisdictions in the world to significantly curtail the use of death as a criminal sanction’.²⁴ Furthermore, he took various measures for the welfare of inmates including ‘unjust torture and imprisonment should cease’.²⁵ Chinese Buddhist monk visited India in the fifth century AD and he remained in there for twelve years and he reflected in his travel account ‘the king governs without decapitation or corporal punishment and

²⁰ Leanne Fital Alarid and Hsiao-Ming Wang, ‘Mercy and Punishment: Buddhism and the Death Penalty’ (2001) 28(1) *Social Justice: A Journal of Crime, Conflict and Social Order* 231, p. 237.

²¹ Harischandra Kaviratna(trs.), *Dhammapada: Wisdom of the Buddha* (Pasadena: Theosophical University Press, 1980), p.55.

²² Rakhal Das Banerji (n 11), p. 64.

²³ Charles Harcourt Forbes-Lindsay, *India Past and Present, Vol1* (Philadelphia: Henry T. Coates & Co. 1903), p. 32.

²⁴ Damien P. Horigan, ‘An Ancient Precedent: Reflections on the Tale of Korea’s Abolition King’ (2001) 29 *Korean Journal of International and Comparative Law* 87, p. 102.

²⁵ Max Weber, *The Religion of India: The Sociology of Hinduism and Buddhism, Translated & Edited by Hans H. Gerth and Don Martindale* (Cambridge: The Free Press, 1958), p.238.

criminals are simply fined, lightly or heavily according to circumstances'.²⁶ The very influence of Buddhism could not survive for a long time. In the following centuries, both the death penalty and harsh punishments were the main features of the criminal justice system in South Asia.

Hinduism and Ancient Indian Jurisprudence

The jurisprudence of Ancient India, which was essentially Hindu-ruled based upon the collections of ancient hymns and prayers, known by the names of Vedas. There are four Vedas which are the chief sacred books of Hindus: Rig Veda(the science of praise), Atharwa Veda(the science of magic), Yajur Veda(the science of sacrifices), and Sama Veda(the science of melodies).The diversity of Vedas, both of style and contents, shows that they are production of different periods, between which a considerable interval must have elapsed'.²⁷

The literary traditions of the Vedas are one of the major sources of compilation of Dharmashastra. Dharmashastra, are ancient Sanskrit works prescribing the rules of Dharma. In short, they are the 'rules of conduct of man, a narration of do's and don'ts'.²⁸ These codes which have been recognized as authoritative are said to be twenty in number, each being called a Samhita or a treatise composed or compiled by a holy Brahmin held in high esteem by all and sundry. Amongst the authors of the Dharmashastra, Manu is accepted as the eldest, and the authoritativeness of his code surpasses that of others. Later sages have uniformly acknowledged his superiority, and 'have often referred to him for lending support to their own sayings'.²⁹ Mohin Das also maintains that 'the Manusmrti occupies a unique position in the Hindu Dharmashastra literature'.³⁰ It is difficult to date the laws of Manu with any precision. Drapkin estimates that 'they were put into writing between the first century BC and the fourth century AD'.³¹ The extent to which the Dharmasastra was an applied

²⁶ Fa-Hien, *Travels in India and Ceylon*, Translated by James Legge (Oxford: Clarendon Press, 1886), p. 43.

²⁷ Beveridge Henry (n 5), p.19.

²⁸ Tarapada Lahiri, *Crime and Punishment in Ancient India* (New Delhi: Radiant Publishers, 1987), p.1.

²⁹ Ibid, p. 4.

³⁰ Ram Mohan Das, *Crime and Punishment in Ancient India: with a Particular Reference to the Manusmrti* (New Delhi: Kanchan Publications,1982), p. 1; also see Lionel David Barnett, *Antiquities of India: An Account of the History and Culture of Ancient Hindustan* (London: Philip Lee Warner, 1913), p. 96.

³¹ Israel Drapkin (n 8), p. 117.

source of jurisdiction in the pre-modern judicial and legal procedure in South Asia has puzzled and troubled many scholars of classical Hindu Law.

2.1.3 Crimes and Punishments in Ancient India

Manu speaks of four forms of punishments, (1) Vakdanda (admonition), (2) Dhikdanda (censure), (3) Dhanadanda (pecuniary punishment such as a fine or forfeiture of property, and (4) Badhadanda (all sorts of physical punishments including the death penalty).³² The different varieties of Badhadanda or physical punishments recommended by the authors are: (1) tadanam (beating),³³ (2) severance of limbs,³⁴ (3) branding (imprinting marks on visible parts of the offender's body, indicating that he or she is convicted,³⁵ (4) capital punishment,³⁶ and (5) pouring heated oil into the offender's earhole.³⁷ According to Rama Parsad, 'the Jus talion which is so universally represented in archaic legislations becomes especially conspicuous in these punishments'.³⁸

In ancient India, the system of punishment was dictated by three factors namely trial by ordeal, *danda* (rod of punishment) and the caste system.

(A) Trial by Ordeal

The knowledge regarding the procedure adopted in deciding cases in the courts is unfortunately very little.³⁹ However, many authors of ancient history confirm that 'trials by ordeal were frequently resorted to'.⁴⁰ Ordeals as a feature of Indian law extended as far back as the Atharva Veda and the Upanishads and contains through all of later ancient Indian legal texts.⁴¹ The laws of Manu prescribe a number of trials by ordeal, particularly in cases where witnesses were not available or were considered

³² Graves Champney Houghton & Standish Grove Grady, *Institutes of Hindu law, or, The Ordinances of Menu, According to the Gloss of Cullūca: Comprising the Indian System of Duties, Religious and Civil* (London: Wm. H. Allen, 1869), p. 164.

³³ Manu, Ch. VIII. SI.316 in Sir William Jones (Tr.), *Institutes of Hindu Law or Ordinances of Menu* (Calcutta: Printed by Order of the Government, 1796)

³⁴ Manu, Ch. VIII. SI. 193,270,280-1.283,325,334,342,352,367,374; Goutama, Ch. XII, Vishnu, Ch. V, r.19-21,23,24,81,125,135

³⁵ Vishnu, Ch. II, r.3-7,20

³⁶ Manu, Ch. IX, SI.232; Vishnu, Ch. VIII, r.43-V

³⁷ Manu, Ch. VIII, SI. 272

³⁸ Rama Prasad Das Gupta, *Crime and Punishment in Ancient India* (Calcutta: Book Company, 1930), p. 57.

³⁹ Arthur Llewellyn Basham, *The Wonder That was India: A Survey of the History and Culture of the Indian Sub-Continent Before the Coming of the Muslims* (New York: Taplinger Publishing Company, 1968), p. 122.

⁴⁰ Edward C. Sachau, *Al Beruni's India Vol.2* (London: Kegan Paul, Trench, Trübner & Co., 1910), pp.158-159 also see Muhammad Bashir Ahmad, *The Administration of Justice in Medieval India* (Aligarh: The Aligarh Historical Research Institute, 1949), p. 59.

⁴¹ Johan W. Spellman, (n.7), p. 119.

unreliable.⁴² The belief in ordeals does not seem contradictory in a society where religion was a great binding force.

Among other ordeals, ordeals by fire and water were frequently employed to prove the innocence of the accused because both water and fire occupy an important place in the Hindu religion. It was believed that agni (fire), as one of gods enjoyed purifying qualities. The accused was 'required to lick a red hot plough share with his tongue or pick a coin out of a pot of boiling liquid'.⁴³ In another ordeal 'an accused was required to hold in his hand a red hot iron wrapped in a leaf in order to establish his defense if his hands are not burnt he is innocent'.⁴⁴ Water also played an important role in ordeals. An accused person was often thrown into the water if he was innocent he would not drown.⁴⁵

In some cases, the accused was made to take a caustic drink (Bish). It was believed that if he spoke the truth the drink would do no harm to him.⁴⁶ Ketosis, Greek historian of the fifth century BC, speaks of a more drastic form of ordeal. He mentions a fountain from which he says the water coagulates like cheese. If a person drinks he becomes delirious and confesses everything he has done.⁴⁷

(B) The Philosophy of Danda (Rod of Punishment)

The philosophy of *Danda* (stick) was a key weapon to suppress crime and award severe punishments. The religious text advocates that the only way that a man might be kept pure and righteous was by the fear of *danda* and the whole race of men is kept in order by punishment.⁴⁸ In varying contexts it may be translated as military force, coercion and severe punishment. This world is brought to righteousness through *danda*, the rod of punishment; hence 'the science of kingship is called *dandaniti* (the administration of force)'.⁴⁹ Manu says in order to reinforce the 'power of the king' and make it effective in protecting the people 'the creator simultaneously created *danda* from his own body'.⁵⁰ Law is nothing but *danda* itself.⁵¹ The laws of Manu, the

⁴² Manu, Ch. VIII, S.I. 109f, 190.

⁴³ Lionel David Barnett, *Antiquities of India: An Account of the History and Culture of Ancient Hindustan* (London: Philip Lee Warner, 1913), p. 127.

⁴⁴ Ibid, p.127.

⁴⁵ Muhammad Bashir Ahmad (n 40), p. 60.

⁴⁶ Johan W. Spellman (n 7), p.120.

⁴⁷ John Watson M'Crindle, *Ancient India: As Described by Ktésias the Knidian* (London: Trubner & Co, 1882), pp. 17-18.

⁴⁸ Manu, Ch. VII, SI 22.

⁴⁹ Arthur Llewellyn Basham (n 39), p. 80.

⁵⁰ Manu, Ch. VII, SI. 13.

Arthashastra of Kautilya Chanakya, and the Mahabharata⁵² all state that *danda* must be wielded with maximum discretion by the King to uphold justice. In Indian jurisprudence dispensing justice and awarding punishment was one of the primary attributes of sovereignty. The King was also the chief of judiciary of the State.⁵³

(C) Caste Ridden System of Punishments

Max Weber elucidates that ‘the caste system was the basis of Hindu society and state’.⁵⁴ It is thus no wonder that it played an important part in Hindu criminal law. While in the laws of many ancient and medieval states a distinction was drawn between the noble and the commons, ‘in India this distinction took a different shape- viz., that of caste’.⁵⁵

Hindu society as described by the writers of the period consisted of four castes (varna or colours) and a number of non-caste groups, the Brahmins or the priests, the Kshattriyas or the warriors, the Vaishyas or the businessmen and the Sudras or the slaves. Ghoshal says that the doctrine of creation of these casts is embedded in Rigveda - a hymn of the last book (mandala) of the Rigveda, namely the celebrated purushasukta.⁵⁶ Manu advocates the supremacy of Brahmin in these words, ‘whatever things exist on earth, belong to the Brahmins; (that is to say), everything on earth is (theoretically) dedicated to him because, by superiority of birth he is made superior to all’.⁵⁷

Appointment of judges and the punishments for various crimes were dictated by the classification of society based upon birth. Brahmins not only effectively controlled much of the court system in ancient India but they, as a class, monopolised legal learning and the judicial posts, and ruled as an oligarchy.⁵⁸ All the law books that mention the matter required the chief judge to be a Brahmin. In exceptional circumstances, ‘it is permissible to appoint a Ksatriya or a Vaisya, but never Sudra be

⁵¹ Manu, Ch. VIII, SI.14.

⁵² Mahab. Ch. XII:58, 78.79.

⁵³ Manu, Ch. VII, SI.1-13; also see Upendra Nath Ghoshal, *A History of Indian Political Ideas: The Ancient Period and the Period of Transition to the Middle Ages* (Oxford: Oxford University Press, 1959), p.43.

⁵⁴ Max Weber (n 25), p.29.

⁵⁵ Rama Prasad Das Gupta (n 38), p. 40.

⁵⁶ Upendra Nath Ghoshal, *A History of Indian Political Ideas: The Ancient Period and the Period of Transition to the Middle Ages* (Oxford: Oxford University Press, 1959), p.19.

⁵⁷ Manu, Ch. I, SI.98-100.

⁵⁸ Muhammad Bashir Ahmad, (n 40), p.60.

appointed'.⁵⁹ If the king should appoint a Sudra as his judge, then 'Dharma would come to ruin as a cow sinks into the mud'.⁶⁰ It is rightly depicted that 'Hindu law was dependent on dynamics of power and authority of various elites, especially the king and the Brahmin'.⁶¹

'Discriminatory justice' founded on the theory of the 'relative superiority and inferiority' of different caste groups has been introduced in penal law prescribing varying degrees of punishment, in cases of several offences, depending on whether the offender belongs to a higher or a lower caste.⁶² The lawgivers repeatedly emphasize that there is no corporal punishment for the Brahmin. To us this exemption of the Brahmin from corporal punishment seems to be an unfair and unreasonable advantage. It goes against the modern canon of justice that 'a particular class of people should be exempted from the severe punishments even when guilty of worst offences, while others are sometimes brutally punished for comparatively light offences'.⁶³

Capital Punishment and the Caste System

Capital punishment was not only common throughout much of Indian history; it was closely connected to caste and class.⁶⁴ India's sacred texts prescribed different punishments for the same crime depending on the offender's position in the prevailing hierarchy. Amongst other distinctions, a Sudra (farmer, servant, or foot soldier) who insulted a Brahmin (priest) faced the death penalty, whereas a Brahmin who murdered a Sudra was given the same light penalty (usually a fine) as he would have received for killing a dog or a cat.⁶⁵ 'If the murderer was a Brahman', says Al Beruni, 'and the murdered person a member of another caste, he was only bound to do expiation consisting of fasting, prayers and almsgiving'.⁶⁶ Brahmin in general enjoyed

⁵⁹ Manu, Ch. VIII, SI.9,20.

⁶⁰ Manu, Ch. VIII, SI.21

⁶¹ Axel Michaels, 'The Practice of Classical Hindu Law' in Timothy Lubin, Donald R. Davis Jr, & Jayanth K. Krishnan (eds.), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press, 2010), p.77.

⁶² Tarapada Lahiri (n 28), p.71.

⁶³ Rama Prasad Das Gupta, *Crime and Punishment in Ancient India* (New Delhi: Bhartiya Publishing, 2007), pp.43-44.

⁶⁴ David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford: Oxford University Press, 2008), p.428.

⁶⁵ Edward Luce, *In Spite of the Gods: The Rise of Modern India* (New York: Random House LLC, 2010), p. 108.

⁶⁶ Edward C. Sachau, *Al Beruni's India Vol.2* (London: Kegan Paul, Trench, Trübner, 1910), p.162; Muḥammad Ibn Aḥmad al-Bīrūnī, *مردولة أم العقل في معقولة مقولة من للهند ما تحقيق*, (Alberuni's Idica), Trans. Ahmad Hassan Dani (Islamabad: University of Islamabad Press, 1973), p. 188.

immunity from capital punishment.⁶⁷ Das Gupta condemns capital punishment based upon discrimination:

It must be admitted that in the case of the Sudras capital punishment or mutilation has sometimes been prescribed for even trivial offences for which men of other castes were more leniently treated. This is however a great blot on the Hindu criminal law and civilization.⁶⁸

2.1.4 Offences Punishable with Death

In ancient jurisprudence, a wide range of offences were punishable by death. Capital punishment for ‘murderers, robbers, incendiaries, forgers, bridge-breakers, and for those who pilfer rice during weighment (the quantity being more than what would fill ten pitchers’.⁶⁹ Capital offences based upon class and caste include: a non-Brahmin(intentionally) insulting a Brahmin by audaciously calling him by name or vilifying his caste⁷⁰ a non-Brahmin violating chastity of a Brahmin woman,⁷¹ a Sudra intentionally inflicting hurt on a Brahmin,⁷²and an antyaja (casteless tribal) committing sexual intercourse with a woman of Aryan stock.⁷³ Corrupt practices by ‘a public servant having three previous convictions’ was also a capital offence.⁷⁴ Pickpocketing was a capital offence if it was committed for the third time as Manu says ‘on the third, he shall suffer death’.⁷⁵ Theft of Mahapashu(elephant, horse, etc.) was also liable to the death penalty.⁷⁶

The list reflects that trivial and caste based offences were liable to capital punishment. Like other ancient civilizations in the world the capital offences in India were numerous and petty in nature.

2.1.5 Methods of Executions

There were different ways by which a death sentence could be executed with ‘picturesque ingenuity’.⁷⁷ Jolly(Sanskrit scholar) expresses his opinion that ‘capital punishment in various aggravated forms, such as impaling on a stake, trampling to

⁶⁷ Lionel David Barnett (n 43)., p. 122.

⁶⁸ Rama Prasad Das Gupta (n 63), p. 60.

⁶⁹ Tarapada Lahiri (n 28), p.192.

⁷⁰ Manu, Ch. VIII, SI. 271.

⁷¹ Manu, Ch. VIII, SI.359, 377,379

⁷² Manu, Ch. IX, SI.248

⁷³ Yajñabalkya, Ch.II.SI.297.

⁷⁴ Arthashastra, Book IV, Ch. X

⁷⁵ Manu, Ch. IX, SI.277

⁷⁶ Yajñabalkya, Ch. II, SI.276

⁷⁷ Lionel David Barnett, (n 43), p. 122.

death by an elephant, burning, roasting, cutting to pieces, devouring by dogs, and mutilations, were also frequently inflicted even for comparatively light offences'.⁷⁸ The other forms of executions are narrated in Manu: (a) by causing the offender to be burnt to death,⁷⁹ (b) by thrusting a red-hot iron into the offender's mouth,⁸⁰ and (c) by getting the offender devoured by hunting dogs.⁸¹

Kamandaka subdivided capital punishment into two varieties, namely public and secret. Public executions were conducted when the criminal was hated by the people or was an enemy of the state whereas secret execution were intended for those whose public execution would arouse discontent and anger of the people. According to Kamandaka, 'a secret execution could be carried out with the help of poison, secret appliances, weapons or even ointments'.⁸²

The Jataka gives us greater details. A special 'execution drum (vajjabheri)' announced the event.⁸³ With dust on his head, a garland of red flowers around his neck and his hands tied behind his back, the condemned person was beaten with whips as he made his way to the place of execution.⁸⁴ The executioner, dressed in yellow and also wearing a garland of red flowers followed the procession armed with an axe and a rope. The Criminal was placed in a circle at the 'place of execution' (aghatam), while the executioner was made ready. Neither was allowed to speak to the other and 'the axe did its deed'.⁸⁵

No one will deny that judged by modern standards the methods of capital punishment in ancient India were cruel and brutal.⁸⁶

Prisons System in Ancient India

Very little information is given in the Hindu texts concerning the length of prison sentences or the crimes for which offenders were sentenced. It may be discerned from the Vedic text that prisons were not used as general form of punishment until around

⁷⁸ Julius Jolly, Crimes and Punishment(Hindus)', Encyclopedia of Religion and Ethics Vol. IV (1908), p. 284.

⁷⁹ Manu, Ch. VIII, SI.372.

⁸⁰ Manu, Ch. VIII, SI. 271.

⁸¹ Manu, Ch. VIII, SI.371.

⁸² Kamandaka, Ch.XIV:16; also see Sulka Das, *Crime and Punishment in Ancient India: CAD 300 to AD 1100* (New Delhi: Abhinav Publications, 1977), pp. 75-76.

⁸³ Jataka, I, p. 500; Jataka, III, p. 50.

⁸⁴ Ratilal.N. Mehta, 'Crime and Punishment in the Jatakas' (1936) XII (3) *Indian Historical Quarterly* 432, p.441.

⁸⁵ Jatkas, III, p. 41.

⁸⁶ Rama Prasad Das Gupta, (n 63), p. 64.

800 BC.⁸⁷ Manu mentions imprisonment as one of three methods of restraining the wicked and the other two are fetters and corporal punishment.⁸⁸ Kautilya implies that a fairly 'well organized system was in use'.⁸⁹ Buddhist Jatakas is also full of allusions to contemporary prisons system.

There seems to little doubt that the life of a prisoner was very hard and troublesome. He was often bound in chains of irons (sankhalika-bandhanam) and suffered much.⁹⁰ He was not allowed to take a bath or rinse his mouth or perform any bodily ablutions, until he was reduced to a miserable plight.⁹¹ In other words the severity of life in prisons was equal if not greater in terms of harshness to many corporal punishments.

2.1 Capital Punishment in Medieval India (1206-1806A.D)

During the Medieval period various Muslim dynasties ruled the subcontinent. Generally, historians subdivide the period into Sultan of Delhi ⁹²(1206-1545) and Mughal Rule ⁹³(1526-1806). Muslim rule in India was firmly established in the thirteenth century and flourished until the beginning of the eighteenth century.⁹⁴ The Sultanate of Delhi ushered in a period of Indian cultural renaissance.⁹⁵ India's ancient culture did not perish before the onslaughts of the Muslims, as did that of Persia. In the opinion of Basham 'in general the Muslims were reasonably tolerant and at all times Hindu chiefs continued to rule in outlying parts of India, paying tributes to their Muslim overlords'.⁹⁶

Administration of Justice

A) Monarchy

⁸⁷ Johan W. Spellman (n 7), p. 117.

⁸⁸ Manu, Ch. VIII, SI.310.

⁸⁹ Arth. II, XXXVI, 147.

⁹⁰ Jatakas, VI, p.427 (Maha-Ummaga Fataka no.546).

⁹¹ Jatakas, VI, p.8. (Muga-Pakkha Fataka no.538).

⁹² Delhi Sultanate, principal Muslim sultanate in north India from India the 13th to the 16th century. The Sultanate Dynasty was served by a heterogeneous elite of Turks, Afghans, Khaljīs. Delhi Sultanate was absorbed by the emerging Mughal Empire.

⁹³ Mughal dynasty, Mughal also spelled Mogul, Arabic Mongol, Muslim dynasty of Turkic-Mongol origin that ruled most of northern India from the early 16th to the mid-18th century, after which it continued to exist as a considerably reduced and increasingly powerless entity until the mid-19th century.

⁹⁴ Saiyid Athar Abbas Rizvi, and Arthur Llewellyn Basham, *The Wonder that was India: A Survey of the History and Culture of the Indian Sub-continent from the Coming of the Muslims to the British Conquest, 1200-1700. Vol. 2* (London: Sidgwick & Jackson, 1987), p. xvii.

⁹⁵ Soujan Seth, *Ancient and Early Medieval History of India* (New Delhi: Navyug Publishers and Distributors, 2009), p. 248.

⁹⁶ Arthur Llewellyn Basham (n 39), p. 481.

The justice system introduced by the Muslim rulers enjoyed some similarities with the Hindu legal system. Both systems laid emphasis on the trial of cases by the ruler himself and on his duty to select good men to act as judges. This period was a continuity of ancient India's system of monarchy with a new element of the Islamic system of crimes and punishment. The King was the head of the executive, the legislative and the judiciary. He made laws and issued administrative ordinances which had the force of law, although the principles of Shariate were generally adhered to. Banerjee points out that 'there was no constitutional machinery, such as a legislative body or an independent judiciary to control the emperor actions'.⁹⁷ The medieval Indian state remained autocratic in character throughout, and represented in India the western ideal of L' Etat c'est moi of the French monarchs. The domain of legislation, as was the case in medieval Europe, did not belong to the people. Different sets of people all looked upon the King as 'the fountain of justice and were content to be thankful if he was strong enough to maintain an efficient administration'.⁹⁸

B) The Royal Court

The Muslim kings attributed paramount importance to justice. The emperor was 'the highest court of appeal and sometimes acted as a court of first instance as well'.⁹⁹ William Hawkins who visited India during Jahangir's reign (1608-13) remarked that the Indian kings sat 'daily in justice every day'.¹⁰⁰ The Muslim emperors are known in history due to their ways of conducting the court. Humayun introduced a 'drum of justice' and Akbar administered justice personally in open court 'every morning at the Jharokha-i-Darshan'.¹⁰¹ In Jahangir's reign a chain of gold was hung from the balcony of his Jharokha-i-Darshan to a pole fixed outside the Agra fort to which suitors could tie their petitions.¹⁰² It is debatable whether this system was effective in redressing 'acts of gross injustices' committed against the poor who were living away from the

⁹⁷ Anil Chandra Banerjee, *A New History of Medieval India* (New Delhi: S. Chand, 1986), p.393.

⁹⁸ Muhammad Bashir Ahmad (n 40), p. 61.

⁹⁹ Ibid, p.410.

¹⁰⁰ William Foster, *Early Travels in India 1583-1619* (Oxford: Oxford University Press, 1921), p.115.

¹⁰¹ Satya Prakash Sangar, *Crime and Punishment in Mughal India* (New Delhi: Reliance Publishing House, 1998), pp. 21-22.

¹⁰² Ibid., p. 21.

capital and could not get access to the court in fear of local authorities, long distances and unsafe roads.¹⁰³

(C) Jurisprudence and Working of Courts

The contemporary Persian authorities, as well as foreign travelers, have distinctly referred to Courts of Justice and the ‘Qazis of those times’¹⁰⁴, and to the system of appeals¹⁰⁵ and punishment, and also to the exercise of the Royal prerogative by the medieval rulers. Next to the emperor was ‘the Chief Qazi (Qazi-Ul-Quzat)’ who held the office of chief *sadr*- *Sadr-Us-Sudur* as well.¹⁰⁶ There was proper hierarchy of the courts and they were divided into civil and criminal in their jurisdiction. At the district level two different branches were headed by two independent Qazis. Banerjee notes that ‘in the rural areas justice was administered by the panchayats (village council) in conformity with customary law and caste usage’.¹⁰⁷ The procedures of courts were administered under the authoritative works on the Muslim Law as the *Hidayah*, the *Fiqh e Firoz Shahi* or the *Fatawa e Alamgiri*.¹⁰⁸ *Hidayah* was written by Burhan Uddin al-Farghani al-Marghinani in 1197 AD. It was generally accepted as the leading authority in the Turkish courts and in practically the whole of Muslim India, until replaced by the *Fatawa e Alamgiri* about 1670 AD

The judicial system, in terms of modern system, may be ‘crude and capricious’ but not ‘tedious’.¹⁰⁹ Terry, a European missionary attached to the Staff of Sir Thomas Roe, confirms that trials were ‘quick’ and procedures ‘simple’.¹¹⁰ Bernier enumerates the ‘advantages of despotic’ governments in these words: ‘they have few lawyers, and fewer law suits, and those few are more speedily decided’.¹¹¹ This Persian proverb reflects the spirit of the court system: *Na-Haqqi Kutah bihtar az Haqqi Diraz*-(speedy injustice is preferable to tardy justice)

¹⁰³ Francois Bernier, *Travels in Mogul Empire 1656-1668*, Translated by Archibald Constable (Oxford: Oxford University Press, 1891), p. 225.

¹⁰⁴ Abdul Qadir Al-Badaoni, *Muntakhab-ut-Tawārīk*, Vol.1, Translated by George S. A. Rankin (Calcutta: Baptist Mission Press, 1898), pp. 239-240.

¹⁰⁵ William Harrison Moreland, *India at the Death of Akbar* (London: Macmillan, 1920), p.36

¹⁰⁶ Saiyid Athar Abbas Rizvi and Arthur Llewellyn Basham (n 94), p.187.

¹⁰⁷ Anil Chandra Banerjee (n 97), p. 411.

¹⁰⁸ A comprehensive legal digest was prepared by a syndicate of theologians under Aurangzeb’s directive.

¹⁰⁹ Sidney James Owen, *The Fall of the Mogul Empire* (London: John Murray, 1912), p. 4.

¹¹⁰ Edward Terry, *A Voyage to East-India 1655* (London: J. Wilkie, 1777), pp.353-54.

¹¹¹ Francois Bernier (n 103) p. 236.

2.2.1. System of Punishment

During medieval India, the Muslim law of crimes had become the law of the land for the administration of criminal justice. Every violation of a public or a private right was punishable in four ways: Hadd'(unalterable punishment prescribed by Sharia), Qisas(retaliation means, in principle, life for life, limb for limb), Diyat(blood money) and Ta'zir(the punishments which are not mentioned in the Quran). Ta'zir places a special responsibility on the ruler and the judge. The kind and the severity of punishment were left entirely to the discretion of the judge. According to Ibn Hasan 'during the medieval period no effort was made to standardize punishment for offences under Ta'zir and no period was fixed for imprisonment'.¹¹²

Despite claims of Muslim rulers about their adherence to Islamic principles of equity and justice they inflicted penalties based upon their personal whims. In fact, intermittent outbreaks of crime such as robbery and murder and the consequent restlessness amongst the subjects tended to increase the uneasiness of medieval rulers and induced them in 'many cases to inflict penalties wholly opposed to the spirit, if not the letter, of the Shara'.¹¹³ In answer to the question of Muslim King Muhammad Tughliq, Zia Ud Dinn Berni, scholar of Islamic jurisprudence, replied that in the Quran three offences are liable to capital punishment –apostates, shedder of Mohammeden blood and double adulterers. The King said, 'all this may be very true, but mankind has become much worse since those laws were made'.¹¹⁴ Retributive justice and harsh punishments were two salient features of system of punishment.

2.2.2 Capital Offences

The death sentence was usually passed in offences of murder, treason, theft from royal treasury, adultery by a married person and oppression of riots by officials, robbery and theft.¹¹⁵ In this context, Ibn Hasan collected twenty five cases of capital punishment tried and decided during the period of three Mughal emperors. Of these, thirteen belong to the reign of Akbar, twelve to Jahangir and one to Shah Jahan. The number of cases and their respective number of offences are given below:

¹¹² Ibn Hasan, *Central Structure of the Mughal Empire and Its Practical Working Up to The Year 1657* (Oxford: Oxford University Press, 1936), p. 336.

¹¹³ Abdul Qadir Al-Badaoni(n 104), p. 239.

¹¹⁴ Muhammad Qasim Firišta, *History of the Rise of the Mahomedan Power in India, Till the Year AD 1612, Vol.1, Translated by John Briggs* (London: A. & R Spotiswoode, 1829), p.436.

¹¹⁵ John Fryer, *A New Account of East India and Persia: Being Nine Years' Travels, 1672-1681, Edited by William Crooke* (London: Hakluyt Society, 1912), p.244.

Eleven charged with murder, seven charged with open revolt, including desertion to enemy, one charged with theft committed in the royal treasury, one charged with highway robbery, one charged with plunder of an enemy's camp by soldiers without order, one committed adultery by a married man, one (1) charged with shiqdar for oppressing the raiyyat, one charged with obstructing in the royal hunt, one was charged with selling dog's flesh for goat's meat during the famine under Shan Jahan (fourth year of the reign).¹¹⁶

This list shows that capital punishment was in vogue for crimes of petty nature. Last but not least, the Muslim rulers never made attempt to reduce the range of capital offences in consonance with the injunctions of Sharia.

Treason

During the medieval period treason (ghadr) was looked upon as an offence against God and religion. The accused of treasons was executed mercilessly without due process of law in gross violation of spiritual and temporal dictates. Dow writes that 'in the majority of these cases the punishment inflicted was death unless the ruler chose to exercise his prerogative of mercy'.¹¹⁷ No distinction was made between Muslims and Non-Muslims in awarding sentence or between highly placed persons and ordinary subjects. Gheias-ud-Deen Bulbin put to death 'every member of the rebel's family and order the execution of a hundred holy mendicants together with their chief Kullunder'.¹¹⁸ During the reign of Muhammad Bin Tughliq, Bahaud-d Din was convicted of treason and 'the flesh of the accused was roasted with rice, some was sent to his children and his wife and the remainder was thrown to the elephants to be devoured'.¹¹⁹

2.2.3 Methods of Execution

It seems that with regards to methods of executions no uniform standard was adhered to during the times of medieval India. Ibn Hassan says that 'it depended mostly upon

¹¹⁶ Ibn Hasan (n 112), pp. 331-32.

¹¹⁷ Alexander Dow, *History of Hindustan, Vol. III* (London: T. Beket and P. A. DeHondt, 1772), pp-91-92.

¹¹⁸ Muhammad Qasim Firišta, *History of the Rise of the Mahomedan Power in India, Till the Year AD 1612, Vol. I, Translated by John Briggs* (London: A. & R Spotiswoode, 1829), p. 96.

¹¹⁹ Vincent Arthur Smith, *The Oxford History of India: From the Earliest Times to the End of 1911* (Oxford: Clarendon Press, 1920), p.241; Ibn Battuta, *The Travels of Ibn Battuta: in the Near East Asia & Africa 1325-1354*, Translated by Rev. Samuel Lee (London: Oriental Translation Committee, 1829), p.146.

the nature of the offence and the circumstances of the case'.¹²⁰ The death penalty could be inflicted by way of hanging, beheading, and impaling. 'Of the twenty-five cases of capital punishment, studied by Ibn Hasan during the reign of three Mughal Kings, five were trampled under the feet of elephants, one was strangled, and the rest were either beheaded or hanged'.¹²¹

The common method of execution was to get the criminals trampled under the feet of elephants. The various Kings used to keep elephants for the execution of 'malefactors'.¹²² Jahangir(1605-26) took interest in seeing condemned prisoners torn to pieces by elephants. Terry depicts the horrible scene of torture of being trampled on by elephants as 'the elephant will break his bones by degrees, as men are broken upon the wheel, as first his leg, then his thighs, after that bones in his both arms'.¹²³

The accounts of European travelers reflect that unspeakable methods of execution were in vogue during the reigns of some Muslims rulers. It was also in the reign of Jahangir a dacoit, with seven previous convictions, was torn limb after limb till he died. Terry asserts that, 'among other forms of punishment, malefactors were stung to death by snakes'.¹²⁴ Manucci reports that Shahjan used to punish 'any official who had failed to administer justice' by poisonous snakes.¹²⁵ Shahjahan ordered corrupt Kotwal(Muhammad Sa'id)to be bitten by a cobra capello in his presence in the open court, and then ordered that 'the body should lie two days in front of his court-house'.¹²⁶ Execution could take place by throwing a man down from the roof.

To serve as deterrence, the executions used to be conducted in public. During the reign of Muhmmad Bin Tughliq, the persons condemned were executed outside the first gate of the court 'where their bodies lay exposed for three days and their relatives were not allowed to give a decent burial'.¹²⁷

Minimize Arbitrariness of Capital Punishment

Mughal rulers took some measures to minimize the arbitrariness of the capital punishment. During the times of Mughal India provincial governors and other

¹²⁰ Ibn Hasan (n11) p. 332.

¹²¹ Ibn Hasan (n112) p. 332.

¹²² William Foster (n 100) pp.305-6.

¹²³ Edward Terry (n 110) p. 355.

¹²⁴ Edward Terry (n 110) p.354.

¹²⁵ Niccolao Manucci, *Storia du Mog or Mogul India, 1653-1708, vol.1*, Translated by William Irvine (London: John Murray, 1907), p.197.

¹²⁶ Ibid, p. 197.

¹²⁷ Vincent Arthur Smith, *The Oxford History of India: from the Earliest Times to the End of 1911*(Oxford: Clarendon Press, 1920), p. 245.

executive officers were not allowed to inflict capital punishment in an arbitrary manner. A Farman of Akbar (order) adopted in 1582 'forbade the provincial governors to award the punishment of death without his permission'.¹²⁸ Jahangir had reserved to himself the authority of awarding capital punishment. In Hindustan, especially in the province of Sylhet, it was customary for the people of those parts to turn some of their sons into eunuchs and to give them to the governor in place of revenue (mal-wajibi). Jahangir banned the 'abominable custom of the making of eunuchs and declared it a capital offence'.¹²⁹ Thevenot, who visited India in 1666 AD, observed that neither the civil nor criminal judge can put anyone to death. That power was reserved by the King to himself. The case of a criminal deserving death was 'referred to the King through a special messenger and the punishment was executed only on receipt of his confirmation'.¹³⁰

Prisons system

The accounts recorded by European travellers, as well as the scattered cases in the chronicles, show that there were no regular jails in the modern sense.¹³¹ To incarcerate ordinary criminals and political offenders, two different kinds of confinements were employed. Monserrate, who visited India during the reign of Akber, writes in his account that ordinary criminals were kept under guard in irons, but not in prison. Princes sentenced to imprisonment were sent to the jail at Goaleris (Gwalior) where they rotted away in chains and filth.¹³² Noble offenders are handed over to other nobles for punishment, but the base born either to the captain of the dispatch runners or to the chief executioner.¹³³ Dr.Sangar enumerates three castles-one at Gwalior, second at Ranthambor and the third at Rohtas' that worked as noble prisons.¹³⁴ For ordinary prisoners there were bandikhanas at the headquarters of Subahs, Sarkars, and parganas.¹³⁵

¹²⁸ Abu'l Fazl, *Akbar-Nama, Vol. II, Translated by Henry Beveridge* (Calcutta: The Royal Asiatic Society of Bengal, 1907), p. 559.

¹²⁹ Nur al-Din Jahangir, *Tuzuk-i Jahangirior Memoir of Jahangir, translated by Alexander Rogers and edited by Henry Beveridge* (London: Royal Asiatic Society, 1909), pp.150-151.

¹³⁰ Giovanni Francesco Gemelli Careri, and Jean de Thévenot, *Indian Travels of Thevenot and Careri Edited by Surendra Nath Sen* (New Delhi: National Archives of India, 1949), p. 27.

¹³¹ Ibn Hasan (n 112) p. 336.

¹³² Antonio Monserrate, *The Commentary of Father Monserrate S. J., on His Journey to the Court of Akbar*, Translated by J.S. Hoyland from Latin, and annotated by S.N. Banerjee (London: Humphrey Milford, 1922), p. 211.

¹³³ Ibid, p. 211.

¹³⁴ Satya Prakash Sangar (n 101) p. 38.

¹³⁵ Ibid, p. 38

The condition of the prisoner was generally miserable.¹³⁶ It was binding upon the Qazis, under the Muslim law, to visit the prisons and inquire into their conditions and to release those who showed signs of repentance but usually they neglected their duty.¹³⁷ In this regard, Aurangzeb took special interest and issued instructions to the Kotwals to take the prisoners to the Qazi on the expiry of their term of imprisonment.¹³⁸

2.3 Capital Punishment in British India (1760-1947)

There were two phases of the criminal justice system during the British colonial period in South Asia. In the early phase, two different court systems functioned namely English and Mofussal under the administration of the East India Company. Under the charter granted by the British crown in 1726¹³⁹, English courts had been working in the presidency towns of Bengal, Bihar and Orissa where the company's factories had been established. In 1765, the puppet Moghul emperor recognized British jurisdiction over Bengal, which had been under de facto British control since 1757.¹⁴⁰ Consequently, in 1772, Warren Hastings, the Company's Governor in Bengal, established a system of civil courts (Dewani Adalat) and criminal courts (Faujdari Adalat) governing all inhabitants outside of the Presidency Towns (an area called the Mufassal), 'wherein Kazee and mooftee were allowed to perform their duties as expounders of the law'.¹⁴¹ The second phase of the administration of justice commenced with the promulgation of the Indian Penal Code in 1860 after a complete administrative control of the British over India in 1858 AD.

The First Phase of the British Administration of Justice (1765-1860)

A notable feature of the Indian judicial system before 1862 was the existence of two parallel systems of courts-the supreme courts in the presidency towns¹⁴² and the

¹³⁶ Anil Chandra Banerjee (n 97) p. 412.

¹³⁷ Satya Prakash Sangar (n 101), p. 38.

¹³⁸ Ibn Hasan (n 112), p. 337.

¹³⁹ 13Geo. I, sections 9-30.

¹⁴⁰ Norman Anderson, *Law Reform in the Muslim World* (London: Athlon Press, 1976), p. 20.

¹⁴¹ Regulation of the 15th August, 1772, Section 1- 4, in John Herbert Harington, *An Analysis of the Laws and Regulations Enacted by the Governor General in Council: At Fort William in Bengal, for the Civil Government of the British Territories Under that Presidency vol. I* (London: A. J. Valpy, 1821), p. 299.

¹⁴² King George III, on March 26, 1774, issued a Charter establishing the Supreme Court at Calcutta

adalat in the territory known as the Mofussal outside the Presidency Towns (Bengal, Bihar and Orissa).

The two systems differed in many respects. In the Presidency Towns, the judicial system was developed primarily to cater to the needs of the Englishmen residing there and, therefore, it was a replica of the English judicial system.¹⁴³ In the Mofussal a significant proportion of the population was indigenous, and General Hasting, East India Company Governor in the province of Bengal, realized that it would not work if a foreign system was imposed on them.¹⁴⁴ Accordingly, the adalat system was developed there which adjudicated the cases under 'the indigenous Hindu and Muslim laws dealing equal justice on fixed principles to all alike'.¹⁴⁵ In accordance with the Hasting Judicial Plan 1772, 'in all suits regarding inheritance, marriage, caste, and other religious usages and institutions, the laws of the Koran with respect to Mahommendans and those of shaster[Shastra] with respect to Gentoos' were ordained to be applied with the aid of such Moulvis and Pandat'.¹⁴⁶ The Adalat system maintained this characteristic throughout the course of its existence. In 1862, the disparate judicial systems existing in the Presidency Towns and the Mofussil were unified and the High Courts were created.¹⁴⁷

2.3.1 'Mofussal' Courts and the Evolution of Anglo-Muslim Criminal Law

In 1772, the East India Company assumed the responsibility of administering criminal justice in presidency towns the Muslim law of crimes was 'enforced throughout the country'.¹⁴⁸ The British policy was initially based upon non-interference in criminal justice matters, for fear of stirring up resistance.¹⁴⁹ However, as British power was consolidated, the sharia was progressively undermined.¹⁵⁰ In the light of the policy of gradual change, Governor Hastings assumed only indirect control over criminal law proceedings in 1772, leaving native judges nominally in charge of the criminal courts. After Hastings, the process of repealing and amending the Muslim law and

¹⁴³ Mahabir Prashad Jain, *Outline of Indian Legal History* (Bombay: N. M. Tripathi, 1981), p. 3.

¹⁴⁴ Syed Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent* (New Delhi: Vikas Publishing, 1977), p. 5.

¹⁴⁵ Captain L. J. Trotter, *Rulers of India: Warren Hastings* (Oxford: Clarendon Press, 1892), p. 67.

¹⁴⁶ Judicial Regulations of 21 August, 1772, Sec 23, in James Edward Colebrook, *Supplement to the Digest of the Regulations and Laws Enacted by the Governor General in Council for the Civil Government of the Territories under the Presidency of Bengal* (Calcutta: n. p., 1807), p. 5.

¹⁴⁷ Indian High Court Act, 1861.

¹⁴⁸ Herbert Cowell, *The History and Constitution of the Courts and Legislative Authorities in India* (London: W. Thacker, 1872), p. 35.

¹⁴⁹ Daniel P. Collins, 'Islamization of Pakistani Law: A Historical Perspective' (1987) 24 *Stanford Journal of International Law* 511, p. 536.

¹⁵⁰ Richard Vogler, *A World View of Criminal Justice* (Aldershot: Ashgate Publishing, 2005), p. 117.

supplementing the same with principles of English law through government enacted regulations¹⁵¹ started in right earnest from the time of Lord Cornwallis (Governor-General, 1786-93) in 1790 and continued unabated until 1860 when the Indian Penal Code finally ‘superseded whatever did remain of the traditional Muslim criminal law by that time’.¹⁵²

The systematic attempt to modify the existing Islamic criminal law started with the amendment of the law of murder. Under Islamic criminal law, as compared to British law at that time, there were relatively few capital offences.¹⁵³ It is pertinent to mention that under the prevalent system ‘the penal law of Islam was applied to all Indians, Hindus and Muslims alike’.¹⁵⁴ The British changed existing Islamic criminal law, especially the law of murder based upon Qisas and Diyat, because many of its principles were ‘repugnant to the notion of natural justice’ and common sense.¹⁵⁵

Under the prevalent Qisas and Diyat law the legal heir of a slain person had the right to exercise the option of Qisas قصاص (retaliation) or Diyyat دية (blood money). The right of legal heirs to pardon by taking Diyat was meshed with many social and legal complications. On 3rd December, 1790 Lord Cornwallis observed:

The evil consequences, and the crimes which hereby escape punishment, are so manifest and frequent, that to take away the discretion of relations seems absolutely requisite to secure an equal administration of justice and will constitute a strong additional check on the commission of murder, and other crimes, which are now no doubts often perpetrated, under the idea of an easy escape through the notorious defect of the existing law, which at first perhaps was confined to appeals, private prosecutions, by the next of kin and no application to public prosecutions in the name of the sovereign.¹⁵⁶

¹⁵¹ The Regulation Act of 1773 (13 Geo. III., c. 63) sec 36 and 37; The Act of Settlement, 1781 (21 Geo. III., c. 70) Sec 23. In pursuance of the laws governor general and council were expressly empowered to make rules, ordinances and regulations ‘for the good order and civil government’ of the company’s possessions.

¹⁵² Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), p.155.

¹⁵³ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), p.109.

¹⁵⁴ James Norman Dalrymple Anderson and Noel James Coulson, *Islamic Law in Contemporary Cultural Change* (Zurich: Verlag K. Alber, 1967), pp. 42-43.

¹⁵⁵ Rudolph Peters (n 153), p. 109.

¹⁵⁶ Charles Grant, *Observations on the State of Society Among the Asiatic Subjects of Great Britain: Particularly with Respect to Morals: and on the Means of Improving it. Written Chiefly in 1792* (London: House of Commons, 1813), p. 35.

The law of murder did not address all situations. For instance the law was silent in cases where the deceased had more than one legal heir, and one legal heir forgives the killers while the other(s) demand(s) Qisas; or if one of the legal heirs of the murdered person is a minor, or if all legal heirs are minors.¹⁵⁷ Moreover as per the law, the probability of the execution of a Brahmin was remote because ‘in most of the cases it cannot be expected that any Gentoo will ever desire, or be consenting to the death of a Brahmin’.¹⁵⁸ To secure equal administration of justice the right of the victim's next of kin to pardon a murderer, long established in Islamic law¹⁵⁹ was amended in 1790.¹⁶⁰ The amendment enacted the principle that ‘the relatives be debarred from pardoning the offender in future instances and that the law be left to take its course’.¹⁶¹

The prevalent Islamic criminal law maintained a difference between willful murder (Qatal-e- Amad) and culpable homicide based on the mode of commission of murder in accordance with the interpretation of Imam Abu Hanifa (a Muslim jurist of the eighth century). Minutes of Marquis Cornwallis recorded on 1st December 1790, reveal that ‘murder is not liable to capital punishment if he commits the act by strangling, drowning, poisoning, or with a weapon, such as a stick or club on which there is no iron; or by such an instrument as is not usually adapted to the drawing of blood’.¹⁶² Lord Cornwallis vehemently proposed a change in definition of premeditated homicide.¹⁶³ This proposed amendment was materialized initially under the regulation passed in 1790¹⁶⁴ that directed the courts to ensue the opinion of two disciples of Abu Hanifa namely Muhammad al Shaybani and Abu Yousaf with regards to the criterion for determining whether or not a killing had been willful. The regulation enunciated that an ‘instrument of perpetration must not constitute the rule

¹⁵⁷ Mahabir Prashad Jain (n 143), p. 489.

¹⁵⁸ Charles Grant (n 156), p.35.

¹⁵⁹ Muhammad Iqbal Siddiqui, *Penal Law of Islam* (New Delhi: Adam Publishers, 1979), pp.150-51.

¹⁶⁰ Anderson & Coulson (n 154), p. 42.

¹⁶¹ Regulations for the administration of Justice in Foujdary or Criminal Courts in Bengal, Behar and Orissa, 3rd December 1790 sec,34 in James Edward Colebrook, Op. Cit., p.155; the instruction was further issued in detail in Regulation 1793/9 sec 55,76 and Regulation 1797/4 sec3,4, in James Edward Colebrook, Digest, vol. I, pp.526,534.

¹⁶² John Herbert Harington, *An Analysis of the Laws and Regulations Enacted by the Governor General in Council: At Fort William in Bengal, for the Civil Government of the British Territories Under that Presidency vol.1*(London: A. J. Valpy,1821), p.308.

¹⁶³ Charles Grant (n 156), p. 36.

¹⁶⁴ Regulations for the administration of Justice in Foujdary or Criminal Courts in Bengal, Behar and Orissa, 3rd December 1790, sec 33, in James Edward Colebrook, Op. Cit., pp. 154-155.

for determining the punishment of crime of murder'.¹⁶⁵ This provision was enforced in the province of Benares in 1795.¹⁶⁶ The amended law introduced more appealing and rationalized interpretation of the act of premeditated murder.

Another complexity in the law of murder or homicide was that it was not prosecuted as an offence against God or the state but against the individual (hakk Admi).¹⁶⁷ The legal heirs of the murdered person could stop the trial at any stage by reaching compromise with the alleged murderer. It means that prosecution was a private affair. To rectify this glaring gap, the Governor General in Council passed a regulation according to which 'in the case of murder the refusal by the relations of the deceased to prosecute the offenders be no longer considered as a bar to the trial and condemnation of the offenders'.¹⁶⁸

In addition to amendments introduced in the law of murder, the British brought various procedural and substantive changes to the existing criminal justice. The Muslim law did not permit a Hindu to testify against a Muslim accused. The British regarded this rule as 'an odious distinction'.¹⁶⁹ In 1792 the law of evidence was modified.¹⁷⁰ Following the amendment the law provided that 'the religious tenets of witnesses be no longer considered as a bar to the conviction or condemnation of a prisoner'.¹⁷¹ One of the prerequisites of a witness under the prevalent law of evidence was that he or she should enjoy a good reputation but this 'qualification of witness was also exempted'.¹⁷²

The British showed concerned about the inhumane nature of the punishment of mutilation. Under the proceedings of Governor General in Council dated 10th October 1791, the punishment of mutilation was commuted by rigorous imprisonment and

¹⁶⁵ Regulation 1793/9 sec 75, in James Edward Colebrook, *A Digest of the Regulations and Laws Enacted by the Governor General in Council for the Civil Government of the Territories under the Presidency of Bengal Arranged in Alphabetical Order* vol. I (Calcutta: n. p., 1807), p. 533.

¹⁶⁶ Regulation 1795/16 Sec 22, in John Herbert Harington (n 162), p. 312.

¹⁶⁷ George Claus Rankin, *Background to Indian law* (Cambridge: Cambridge University Press, 1946), p. 164.

¹⁶⁸ Regulation of 13th April 1792, sect 1, Extract from the Proceedings of Governor General in Council, in James Edward Colebrook, *Op. Cit.*, p. 161.

¹⁶⁹ Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769-1817* (Wiesbaden: Steiner, 1983), p. 47.

¹⁷⁰ Norman Anderson (n 140) pp. 22-23; Also see George Claus Rankin, *Background to Indian Law* (Cambridge, Cambridge University Press, 1946), p. 171.

¹⁷¹ Regulation of 1792 sec 1, in James Edward Colebrook (n 165), p. 161.

¹⁷² Regulation 1793/9 sec 56, in James Edward Colebrook (n. 165), *Digest*, vol. I, p. 529

each limb counted for seven years.¹⁷³ This spirit of humanism could not work on other inhuman punishments including the death penalty. Jörg Fisch has rightly wondered ‘why the loss of a limb is more cruel or inhuman than the loss of liberty or even the loss of life’.¹⁷⁴ In 1832, another amendment was introduced to promote equity in the criminal justice system. This year saw the end of the Muslim criminal law as a general and compulsory system of law applicable to all, Muslim and Non- Muslim alike.¹⁷⁵ As late as 1852 the position was described by Sir George Campbell in the following words: ‘The foundation of our criminal law is still the Mohammedan code but so altered and added to by our regulations that it is hardly to be recognized’.¹⁷⁶

All the various reforms introduced in Bengal, in the Muslims criminal law, were *mutatis mutandis* introduced in Banaras and other territories as well through various regulations.¹⁷⁷ On a few matters, however, some special legislation was adopted in Banaras.¹⁷⁸ The most typical example of this was the privilege extended to ‘the Brahmins of Banaras of not being punished with death’ rather transportation for life substituted for the capital sentence for them.¹⁷⁹ But this exemption was ‘rescinded, as being contrary to the principles of equality and justice in 1817’.¹⁸⁰ The promulgation of the Indian Penal Code in 1860 merged different systems into one uniform judicial system that could help bring some unity out of the traditional racial, social and political discord of colonial India. Furthermore the authors of the code ‘conferred upon the state the sole power of punishment and pardon’.¹⁸¹

2.3.2 Codification of Indian Law

The Need for Codification

¹⁷³ Vide Proceedings of the Governor-General in Council, dated the 10th Oct. 1991, in James Edward Colebrook (n 165), p.159.

¹⁷⁴ Jörg Fisch (n 169), p.131.

¹⁷⁵ Regulation VI of 1832, sec 5.

¹⁷⁶ George Campbell, *Modern India: A Sketch of the System of Civil Government, with Some Account of the Natives and Native Institutions* (London: John Murray, 1853), p.464.

¹⁷⁷ Mahabir Prashad Jain (n 143), p. 340.

¹⁷⁸ *Ibid*, p.340.

¹⁷⁹ Regulation 1795/16 section 23 in John Herbert Harington (n 162), p. 332.

¹⁸⁰ Regulation 1817/17, Sec.15 in John Herbert Harington (n 162), pp. 332-33.

¹⁸¹ Evan Gottesman, ‘Reemergence of Qisas and Diyat in Pakistan’ (1991-92) 23 *Columbia Human Rights Law Review* 433, p. 435.

In 1833 the attention of the British parliament was directed to three short comings in the frame of the Indian Criminal Justice System. Firstly, ‘the defects were in the laws themselves’, secondly, ‘in the authority of making them’ and thirdly ‘in the manner of executing them’.¹⁸² Criminal law was a mixture of numerous sources of jurisprudence namely Muslim Law, Hindu law, the regulations of the East India Company, as well as a version of the common law. To address the residuary subjects, Sir Elijah Impey, as the sole Judge of the Sadar Diwani Adalat, had it prescribed through a regulation that ‘in all cases, for which no specific directions are hereby given, the Judges of Sadar Diwani Adalat should act according to justice, equity and good conscience’.¹⁸³ In the absence of a specific body of law, the maxim of ‘equity, justice, and fair play’ varied from judge to judge.¹⁸⁴ The inevitable result of such a flexible state of law was bound to be confusion and uncertainty in the country legal system.¹⁸⁵ Macaulay’s Speech in Parliament on 10th July 1833 depicted ‘the existing legal system in India as no system at all, but rather as a jumble of laws derived from multiple sources of authority: Hindu, Muslim, Parsee and English’.¹⁸⁶ In the House of Commons debate, Mr. Rickards most accurately described this state of things, when he said ‘we have already seen that, in these tribunals, justice was but the mockery of the term’.¹⁸⁷

The Indian Penal Code 1860

Against this backdrop, Act 1833, section 59 envisaged a general system of judiciary, police and a code of laws that may be applicable in commons to all classes of the inhabitants of India. In 1860, the Indian Penal Code, based on the draft proposed by Macaulay’s commission and revised by Mr. Bethune, the legal member of council, and Sir Barnes Peacock, was passed.¹⁸⁸ In the words of Stokes ‘their basis is the law of England, strips of its local peculiarities, and modified with regard to the conditions,

¹⁸² Herbert Cowell, *The History and Constitution of the Courts and Legislative Authorities in India* (London: W. Thacker, 1872), p. 96.

¹⁸³ Regulation 1781/6, sec. 60; it is also known as Impey’s Code containing 95 sections guidelines for the working of Mufussel Courts

¹⁸⁴ George Claus Rankin (n 167)., p. 22.

¹⁸⁵ Mahabir Prashad Jain (n 143), p. 382.

¹⁸⁶ Thomas Babington Macaulay, *Speeches of Lord Macaulay* (London: Longman Green, and Co. 1886), p. 75.

¹⁸⁷ *HC Deb 10 July 1833, Vol. 19, col 488.*

¹⁸⁸ Francis Du Pre Oldfield, ‘Law Reform’ in Henry H. Dodwell (eds.), *The Cambridge History of India: The Indian Empire 1858-1918, Vol. 6* (Cambridge: Cambridge University Press, 1932), p. 385.

institutions and climate of India'.¹⁸⁹ Much of the substance was borrowed from English Law. It is simplified, intelligible and precise. In the view of Rankin the code is 'far from the complexity of English law'.

Assessing the merits of the Code Sir Fitzjames Stephen, a valiant Benthamite till death, devoting himself largely to drafting or revising codes for India on various subjects described the Code 'as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars to suit the circumstances of British India'.¹⁹⁰ The nomenclature and classification of offences, which was the whole touchstone of a system of penal law, was on the natural and not the technical system. Eric Stokes reckons the most striking feature of Macaulay's Code to be the employment of illustrative examples 'to exhibit the law in full action and show what its effects will be on the events of common life'.¹⁹¹

In spite of its great success, it is not immune to criticism. The constituent elements of mens rea motive, intention, and consciousness are certainly held in view, but 'the clear distinction which Bentham wished to make between motive and intention, in order to avoid the ambiguous term voluntary' is not preserved.¹⁹² It has been criticized as the weakest part of the code. Stephen also criticizes the definition of culpable homicide and murder as 'obscure, culpable homicide is first defined, but homicide is not defined at all, except by way of explanation to culpable homicide'.¹⁹³ Under the Code, culpable homicide is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who provoked him.¹⁹⁴ The provision has been invoked to award a lighter sentence to men who committed 'culpable homicide not amounting to murder' in

¹⁸⁹ Whitley Stokes, *The Anglo-Indian Codes, vol I* (Oxford: Clarendon Press, 1887), p. (xxvi).

¹⁹⁰ James Fitzjames Stephen, *A History of the Criminal law of England, vol.3* (London: Macmillan, 1883), p. 300.

¹⁹¹ Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959), p. 231.

¹⁹² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation Vol. I* (London: Clarendon Press, 1879), p. 40.

¹⁹³ James Fitzjames Stephen (n 190), pp.313-14.

¹⁹⁴ Indian Penal Code 1860, Sec 299, 300.

defense of their family's honor,¹⁹⁵ as defense of the family honor is generally regarded as an excuse for homicide.¹⁹⁶

Indian Penal Code allowed judge to consider the circumstances of a crime and select a death sentence or sentence of life imprisonment though death was the rule and life imprisonment the exception. The code of Criminal Procedure 1898 required a judge to provide 'special reasons' for not making the choice of death penalty. Code of Criminal Procedure Act no.5 of 1898, sec.367(5). Section 303 of Indian Penal Code 1860 prescribed mandatory death sentence for life-term prisoners who committed murder while incarcerated.¹⁹⁷

The Section 303 of the Indian Penal Code authorized mandatory death penalty for the murder committed by life-term prisoner.

Another criticism of the code is that 'it is draconian in its severity as regards to punishments'.¹⁹⁸

2.3.3 Punishments and Capital Offences

The code enumerates six kinds of punishments death, transportation for life, penal servitude, imprisonment with or without hard labor, forfeiture of property and a fine to which offenders are liable under the code as passed.¹⁹⁹ Whipping was inflicted not under the Code, but under the provisions of an act passed in 1864.²⁰⁰ Both whipping and transport for life are inhumane punishments. Henry Maine perceived 'flogging was incapable of remission and once administered, it could not be taken back'.²⁰¹

Two grounds are traced for introducing these severe punishments. Firstly, the British system of punishment had 'eliminated some of the more sanguinary punishments prescribed by indigenous law, such as mutilation, and had reduced the number of cases in which capital punishment was applicable'.²⁰² Secondly, the ideas of the 1838

¹⁹⁵ Indian Penal Code 1860, Sec 304.

¹⁹⁶ Herbert Liebesn, 'English Common Law and Islamic Law in the Middle East and South Asia: Religious Influences and Secularization' (1985) 34 *Cleveland State Law Review* 19, p. 23.

¹⁹⁷ Indian Penal Code 1898, sec.303.

¹⁹⁸ Sir Hari Singh Gour, *The Penal Law of British India; Being a Commentary, Analytical, Critical and Expository on the Indian Penal Code being act XLV of 1860 as Amended up to Date, Vol.1* (New Delhi: Central Book Depot, 1936), p.213.

¹⁹⁹ Indian Penal Code 1860, Ch. III

²⁰⁰ ACT VI of 1864 passed by Governor General of India in Council, Sec II –VI

²⁰¹ Mountstuart Eiphatour Grant Duff, *Sir Henry Maine: A Brief Memoir of His Life* (London: John Murray, 1892), p.121.

²⁰² Anand A. Yang, 'Disciplining Natives: Prisons and Prisoners in early Nineteenth Century India' (1987) 10(2) *South Asia: Journal of South Asian Studies* 29, p. 30.

Committee on Prison Discipline were also crafted to fit the imperatives of the growing colonial system. Thus the report speaks of 'severe imprisonment' without much of the voice of humanitarianism.²⁰³ Overemphasis is on discipline and there is less stress upon reformation or rehabilitation.²⁰⁴ It reflected a notable contrast to the intense and heated disputations dividing English prison reforms from Bentham onwards over the 'twin aims of deterrence and reformation'. Such differences originating in 'discipline and punishment under the British Raj were inextricably linked to the regime's strategies of power and rule'.²⁰⁵

Another kind of painful punishment was shipment of Indian Convicts to Sumatra, Singapore, Mauritius and the Andaman to get rebels and others out of the country. In India, as in England, it was aimed at attaining the penal objectives of removing criminals from their local societies, of 'detering others from committing crimes-deterrence'.²⁰⁶ Owing to the peculiar Indian cultural currency of this punishment, it was to be appraised differently in India than in England. In light of the recommendation of the Prison Committee, British officials considered transportation to be 'a weapon of tremendous power'.²⁰⁷ In other words, transportation was said to 'pack an extra punitive punch because of its negative cultural and religious implications'.²⁰⁸ Clearly transportation was seen as being more painful and more of a deterrent for Indians than it was for English criminals who were shipped to Australia during the same period'.²⁰⁹

Capital Offences

In the Indian Penal Code the capital offences were: (1) waging war or attempting or abetting war against the Queen,²¹⁰ (2) murder,²¹¹ (3) robbery with murder,²¹² (4) a party to a criminal conspiracy to commit an offence punishable with death.²¹³

²⁰³ *Report of the Committee on Prison-Discipline to Governor General of India in Council* (Calcutta: Baptist Mission Press, 1838), para 266.

²⁰⁴ *Ibid*, para 275, 271.

²⁰⁵ Anand A. Yang (n 202), p.30.

²⁰⁶ David Meredith, 'Full Circle? Contemporary Views on Transportation' in Stephen Nicholas (eds.), *Convict Workers: Reinterpreting Australia's Past* (Melbourne: Cambridge University Press, 1988), p. 18.

²⁰⁷ *Report of the Committee on Prison-Discipline* (Calcutta: Baptist Mission Press, 1838), p. 97.

²⁰⁸ Anand A. Yang, 'Indian Convict Workers in Southeast Asia in the Late Eighteenth and Early Nineteenth Centuries' (2003) 14(2) *Journal of World History* 179, p. 186.

²⁰⁹ Martin J. Wiener, *Reconstructing the Criminals: Culture, Law and Policy in England, 1830-1914* (Cambridge: Cambridge University Press, 1990), pp.98-101.

²¹⁰ Indian Penal Code 1860, Chapter VI Section 121.

Thomas Babington Macaulay, as a follower of Benthamism, was against the excessive use of capital punishment, as it is reflected in his minutes recorded on December 14, 1835 'Death is rarely inflicted in this country at present, and it certainly must be the wish of the government and the Law Commission that it should be inflicted more rarely still'. Edward Livingston prepared the penal code in the Benthamite tradition, for the state of Louisiana in 1826 and he argued 'fear of death is not a more powerful preventive of crime than other punishments'.²¹⁴ It is noteworthy that unlike Livingston he (Macaulay) retained capital punishment and he confined it to only two offences- murder and treason. It was a great departure from the contemporary common law that 'was for practical, not humanitarian reasons'.²¹⁵

3.3.4 Methods of Execution

In the latter half of the nineteenth century, the British administration in India resorted 'to make executions less public and put them under wraps'.²¹⁶ It was partly under the influence of Common law at that time. Before the Act of Parliament 1868, executions in England were conducted in public 'to be an essential part of the deterrent value of the death penalty'.²¹⁷ At the same time, public rituals of punishment, such as the pillory and the procession to the gallows, carried multiple risks.²¹⁸ Public punishment in a colonial society was even more politically risky than it was in England.²¹⁹ In times of extreme political tension, such as the Mutiny of 1857-8, 'the British India in fact resorted to public vengeance; images of rebels being hanged from trees and prisoners being blown from the mouths of cannon quickly became part of the political folklore of India'.²²⁰ Once the emergency had passed, however, the state could not

²¹¹ Indian Penal Code 1860, Chapter XVI section 302, 303.

²¹² Indian Penal Code 1860, Chapter XVII section 396.

²¹³ Indian Penal Code 1860, Chapter VA Section 120B.

²¹⁴ Edward Livingston, *The Complete Works of Edward Livingston on Criminal Jurisprudence: Consisting of Systems of Penal Law for the State of Louisiana and for the United States of America, Vol. I* (New York: National Prison Association of the United States of America, 1873), p. 50.

²¹⁵ Sanford H. Kadish, 'Model Penal Code's Historical Antecedents' (1987) 19 *Rutgers Law Journal* 521, p. 528.

²¹⁶ Sumanta Banerjee, *The Wicked City: Crime and Punishment in Colonial Calcutta* (New Delhi: Orient Black Swan, 2009), p. 576.

²¹⁷ Home Department, *Report of Royal Commission on Capital Punishment (1949-53)* (London: Her Majesty's Stationary Office, 1953), Para 702.

²¹⁸ Satadru Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi: Oxford University Press, 2000), p. 12.

²¹⁹ Ibid, p. 13.

²²⁰ Satadru Sen (n 218), pp. 13-14.

endure such public punishment. As in England, punishment in India after the Mutiny retreated behind prison walls or to the overseas penal colonies.²²¹

Against this backdrop, executions were conducted in prisons under the method specified in the Criminal Procedure Code 1898 'he be hanged by the neck till he is dead'.²²² Whenever death was inflicted, it was meant to be a 'simple privation of life by hanging',²²³ and the body was usually delivered to the surviving relatives of the deceased. Furthermore, a complete standard procedure was described for execution.²²⁴

3.3.5 Prisons System

Thomas Babington Macaulay, the head of the Indian Law Commission, reinforced in his minutes recorded on December 14, 1834 that 'the best Criminal Code can be of very little use to the community unless there be a good machinery for the infliction of punishment'.²²⁵ Thus, imprisonment, 'the chief form of punishment' had to be made a 'terror to wrong-doers'.²²⁶ In this context, when George Campbell took over as the lieutenant-governor of Bengal in 1871 and he implemented the policy of 'making the prisoner feel the pain and torment of incarceration'.²²⁷

In light of the policy, within the macro-structural punitive institution of the jail 'newer forms of micro-structural penalties were invented by the jail authorities to extend the pain of his/her original sentence'.²²⁸ The motif of disciplining the prisoners was based on adopting two kinds of methods- firstly the prohibitive measures including the denial of basic rights, and secondly corporal punishments including physical torture.

Fetters, the system of chain gang, whipping, solitary confinement, and denial of food, were some of the forms of punishment that were to be followed in Alipore, Presidency and other jails of Calcutta all through the nineteenth century.²²⁹

²²¹ Ibid, p.13.

²²² Indian Code of Criminal Procedure, 1898 (Act No. V of 1898), Sec 368.

²²³ Ibid, Sec 382.

²²⁴ The Indian Prisons Act 1894 (Act X of 1894), Sec 30.

²²⁵ C.D. Dharker, *Lord Macaulay's Legislative Minutes* (London: Oxford University Press, 1946), p.278; Eric Stokes, *The English Utilitarian and India* (Oxford: Clarendon Press, 1959), p.217.

²²⁶ C.D. Dharker (n 225), p. 279.

²²⁷ Charles Edward Buckland, *Bengal Under the Lieutenant-Governors from 1854 to 1898. Vol. I* (Calcutta: S.K. Lahiri, 1901), p. 534.

²²⁸ Sumanta Banerjee, *The Wicked City: Crime and Punishment in Colonial Calcutta* (New Delhi, Orient Black Swan, 2009), p.576.

²²⁹ Sumanta Banerjee (n 228), p. 576-77.

In addition to prisons labor and physical restraints, solitary confinement in cellular prisons or within a prison was another technique to exacerbate the pain of prisoners. To punish the 'guilty of breaches of jail discipline' a range of solitary cells were in operation; in which offenders might be confined in darkness and silence.²³⁰ 'Solitary confinement' was the extreme form of such segregation.²³¹ This was a penalty that was not invented for Indian prisoners alone, but was being experimented with even in European Jails, where the cell system was introduced to move certain types of criminals to total isolation. The European prison with which comparisons arise most easily is London's Pentonville. Ignatieff has stressed the dehumanizing nature of the Pentonville system by referring to the prison as 'the new discipline of solitude and silence' and its daily routine as a 'machine'.²³²

On the model of Pentonville, the cellular jail in Port Blair, the capital of the Andaman and Nicobar (known as Blackwater-Kala Pani) was designed to function as a machine in the process of punishment and reform. To serve the purpose, huge buildings of prisons with cellular cells, were built during the British regime across the subcontinent. The new punishment and the new prison, whether it was Pentonville Port Blair or Indaman, aimed to correct the criminal through combinations of segregation, surveillance, labor and medicine.²³³ The kind of treatment of offenders especially punishments were 'cruel and incompatible with human dignity'.²³⁴

Conclusion

South Asia has a long history of using death as a criminal punishment, and the execution of offenders was a normal punishment from Ancient India to the colonial regime. The retributive justice, deterrence and calculus of terror were associated with the system of crime and punishment during various periods of history in the Indian subcontinent.

²³⁰ James Hutchinson, Esq, *Observations of the General and Medical Management of the Jails and on the Treatment of Some of the Principal Diseases Which Infest Them* (Calcutta: G. H. Huttman, 1845), p.86.

²³¹ *Report of the Committee on Prison-Discipline* (Calcutta: Baptist Mission Press, 1838), para 267.

²³² Michael Ignatieff, *A Just Measure of Pain* (London: Macmillan, 1978), pp. 3-5.

²³³ Satadru Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi: Oxford University Press, 2000), p.14.

²³⁴ Jörg Fisch, *Cheap Lives and Dear Limbs: the British Transformation of the Bengal Criminal Law, 1769-1817* (Wiesbaden: Franz Steiner Verlag, 1983), p.130.

The jurisprudence of ancient India was based upon Hindu religious scripture that characterizes the society into four different castes, the Brahmins, or the priests, the Kshattriyas or the warriors, the Vaishyas or the businessmen and the Sudras or the slaves. Discriminatory justice founded on the theory of relative superiority and inferiority of different caste groups had been introduced in penal law prescribing varying degrees of punishment, in the cases of several offences, depending on whether the offender belonged to a higher or a lower caste. The travel accounts of foreign travellers and the religious text (Dharmasastra or Laws of Manu) portray that Brahmin as a class was exempted from capital punishment. To us this exemption of the Brahmins from capital punishment seems to be an unfair and unreasonable advantage.

Amidst the caste ridden society, Siddhartha Gautam, the founder of Buddhism, was born in 563BC in the royal family of Kapilavastu currently situated in Nepal. Buddha raised his voice against the tyrannies of the prevailing caste system and preached nirvana. 218 years after Buddha's death, the people of South Asia had good reasons to bless the name of Buddha as Ashoka, a fratricide and the wanton slayer of thousands of his subjects, embraced Buddhism. He restricted the use of capital punishment as part of his emphasis on non-violence (ahimsa) making his kingdom one of the first jurisdictions in the world to significantly curtail the use of death as a criminal sanction. Subsequently, no philosopher or political regime supported the abolition of the death penalty in the region. On the whole, as in other ancient civilizations around the world, capital offences in ancient India were numerous and petty in nature and their punishment was based upon the Jus talionis which is so universally represented in archaic legislations.

The period of medieval India (1206-1806 A D) was a continuity of the ancient India's system of monarchy with a new element of the Islamic system of crimes and punishment. In the absence of legislature and constitutional machinery, the domain of legislation, as was the case in medieval Europe, did not belong to the people. Consequently, the medieval Indian state remained autocratic in character throughout and represented in India the western ideal of 'L'etat c'est moi' of the French monarchs. In this scenario, the different sets of people in India were thankful to the King, as a fountain of justice, if he took effective measures to dispense justice. In this

context, some Mughal rulers took measures to minimize the arbitrariness of the capital punishment by prohibiting the provincial governors from inflicting capital punishment without the approval of the king. However, the methods of executions were still inhuman and barbaric.

Against this backdrop, the British implemented the Indian Penal Code, 'in the liberal spirit of reducing archaic forms of discretionary authority and differences in status in order to make the rule of law more effective in a culturally diverse society'.²³⁵ It introduced a comprehensive criminal justice system- a hierarchical network of courts spread throughout the country, a system of appeals, codified and uniform laws, and a sole power of state to prosecute and pardon. It is appreciable that the code did away with inhuman indigenous punishments like the public display of a criminal on the back of an ass, mutilation and leaving the condemned to be trampled by elephants. It introduced the 'most humane method of execution' that ensured 'all executions might be carried out in a becoming manner without risk of failure or miscarriage in any respect'.²³⁶

Under the influence of English utilitarian's Jeremy Bentham and John Stuart Mill, architects of the Indian Penal Code, confined capital punishment to only two offences- murder and treason, however, the imperative of British sovereignty and the gulf between colonizers and colonized inevitably eclipsed the utilitarian project of modern universal reforming legislation. The colonial regime used imprisonment with hard labor, punishment of flogging and transportation for life as a calculus of terror. It is a bitter fact that imprisonment, 'the chief form of punishment'²³⁷ was employed as a 'terror' to malefactors by employing the techniques of segregation in cells and hard labor. At the same time, the punishments of whipping and transporting offenders overseas for life was enforced to tame and discipline the natives of colonial India. Ironically, this emphasis meshed with the rhetoric that sought a moral high ground by espousing the replacement of harsh Islamic punishments with the civilized and

²³⁵ Barry Wright, 'Macaulay's Indian Penal Code: Historical Context and Originating Principles' in Chan, Wing Cheong, Barry Wright, and Stanley Meng Heong Yeo (eds.), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Farnham: Ashgate, 2011), p. 55.

²³⁶ Home Office, *Report of Royal Commission on Capital Punishment (1949-53)* (London: Her Majesty's Stationary Office, 1953), para 703.

²³⁷ C.D. Dharker (n 225), p. 279.

civilizing regime of colonial discipline and punishment. There is no sound argument why the loss of a limb was more cruel or inhuman than the loss of liberty or even the loss of life itself. Again the brutal and brutalizing punishment of whipping finds no justification in a civilized and humane criminal justice system.

Chapter 3

The Impact of the International Legal Framework on Capital Punishment in South Asian Countries

Introduction

The chapter consists of two parts. The first part analyzes the substantive and procedural arguments in favor of the abolition of capital punishment under international law. The second part deals with how international law influences domestic jurisprudence to abolish or restrict the capital punishment in South Asian countries including India, Pakistan and Bangladesh.

3.1 Capital punishment and International Human Rights Law

The ‘International Law is strongly anti-death penalty’.¹ As an issue of international law and human rights, the death penalty is associated with two fundamental human rights norms, the right to life and protection against cruel, inhuman and degrading punishments.² On the basis of the two rights, the comity of nations has signed many treaties and instruments that outlaw the capital punishment. By the turn of the twenty first century the abolition of capital punishment emerged as an international norm.

3.1.1 Capital Punishment as Violation to the Right to Life?

The first legal argument in international human rights law for the abolition of capital punishment is found in Article 3 of the Universal Declaration of Human Rights (UDHR) that says ‘everyone has right to life’.³

The declaration is not binding in nature but it paved the way for the legal binding treaty, International Covenant on Civil and Political Rights. In this context, Article 6(1) of the Covenant ensures that ‘every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.⁴

¹Russell G. Murphy and Eric J. Carlson, ‘Like Snow [Falling] on a Branch...: International Law Influences on Death Penalty Decisions and Debates in the United States’ 2009(38) *Denver Journal of International Law & Policy*, pp-115-160, p.125.

² William A. Schabas, ‘International Legal Aspects’ in Hodgkinson, P. & Rutherford, A. (eds.), *Capital Punishment: Global Issues and Prospects Volume II* (Winchester: Waterside Press, 1996), pp.17-44, p.18.

³ Universal Declaration of Human Rights (adopted 10 December 1948) U NGA Res 217 A (III) (UDHR), art 3.

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6(1).

Under the ICCPR the right to life is one of the rights that cannot be derogated by a state party even in case of emergency.⁵ Owing to the paramount importance of the right to life, it has been incorporated in a variety of regional human rights instruments⁶.

An examination of the provisions on the right to life in international declarations, treaties and regional human rights instruments shows that, only in the Universal Declaration of Human Rights, the right to life ‘stands alone, unblemished by any limitation’.⁷ According to Professor William Schabas, the subject of the death penalty arose at the document drafting sessions and it was not made explicit due to contemporary state practice.⁸ The summary record of the drafting committee reflects that Eleanor Roosevelt’s views against explicit reference to the death penalty in the Universal Declaration of Human Rights⁹ were endorsed by Koretsky of the Soviet Union, Cassin of France, Santa Cruz of Chile and Wilson of the United Kingdom.¹⁰ The International Covenant, the European Convention¹¹ and the American Convention require the right to be protected by law¹² while the African Charter calls for ‘the right to life of every human being to be respected’.¹³ The International Covenant, the American Convention and the African Charter forbid any ‘arbitrary deprivation’ of the right to life while the European Convention forbids any ‘intentional deprivation’ of the right to life. The European Convention refers to certain instances in which deprivations may be permitted under the convention.¹⁴

It is important to know how the right to life intersects the institution of capital punishment. The moot point is whether the state is authorized to take the life of the

⁵ Ibid, art 4(2).

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art4; The American Convention on Human Rights, art 4; Arab Charter on Human Rights, art 5.

⁷ William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002), p.40.

⁸ Ibid, p.366.

⁹ Commission on Human Rights, Drafting Committee First Session (June 13,1947) UN Doc E/CN.4/AC.1/SR.2, p.10

¹⁰ Ibid, p.11.

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 4.

¹² The American Convention on Human Rights, art 4.

¹³ African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force 21 October, 1986) (1982)21 ILM 58(African Charter), art 4.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 2(2).

person who breaches the right of life of his fellow human being. According to Professor Hugo Adam, one of the leading American abolitionists, ‘no theory of rights could be correct or complete without acknowledging a role for the concept of the forfeiture of right to life’.¹⁵ There are two main interpretation of forfeiture of right to life. In line with the traditional interpretation of ‘right to life’ ‘the murderer has forfeited his right to life by committing murder- by becoming a murderer. From Lock in 1690¹⁶ to W.D. Ross¹⁷ in 1930 philosophers who have stated or defended a natural right to life have also insisted that this right can be forfeited under certain conditions. Liberal thinker John Stuart Mill argued that by ‘taking the life of a man who has taken another’s life we show most emphatically our regard for it by the adoption of a rule that he who violates that right in other forfeits for it for himself’.¹⁸ The death penalty cannot be a violation of the right to life, so the argument goes, because that right has already forfeited by the criminal’s act of murder’.¹⁹

On the other hand, with the rise of the subject of human rights after World War II, the abolitionists argue that the right to life is an absolute right and the ‘execution by the state machinery is tantamount to premeditated and cold blooded killing by the state’.²⁰ Capital punishment is a violation to the right to life. This interpretation is endorsed by the UN Human Rights Committee, UN General Assembly Resolutions and the decision of various domestic courts in the world.

The Human Rights Committee is the body of 18 independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its state parties. In a general comment on Article 6 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee has stated:

Article 6 refers generally to abolition (of the death penalty) in terms which strongly suggest that abolition is desirable. The Committee concludes that all

¹⁵ Hugo Adam Bedau, ‘Capital Punishment and the Right to Life’ (2011) 3 *Michigan State law Review* 505, p.516.

¹⁶ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treaties on Government* (Cambridge: Cambridge University Press, 1969), p.127.

¹⁷ William David Ross, *The Right and The Good* (Oxford: Oxford University Press, 1930), p.6.

¹⁸ Great Britain Parliament, John Stuart Mill’s Speech on Capital Punishment against Amendment to Capital Punishment within Prisons Bill, Parliamentary Debate(Hansard), 3rd Series[1830-1888], pp.1047-1055, p.1052.

¹⁹ Hugo Adam Bedau (n 15), p.516.

²⁰ Amnesty International, *When the State Kills: The Death Penalty v. Human Rights* (London: Amnesty International, 1989), p.1.

measures of abolition should be considered as progress in the enjoyment of the right to life...²¹

Given its special position, it is distinctively protected in human rights jurisprudence²² even in state of emergency. It is a right which should not be interpreted narrowly'.²³ The Human Rights Committee described the right to life found in Article 6 of ICCPR as 'the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation...'²⁴

In addition to Human Rights Committee Comments, the death penalty has also been debated within the General Assembly of the United Nations. It took up the issue of capital punishment for the first time in 1968, with a resolution observing that 'the major trend among experts and practitioners in the field is towards the abolition of capital punishment'.²⁵ In resolution of 20th December 1971, the UN General Assembly in order to fully to guarantee the right to life under Article 3 of the Universal Declaration on Human Rights affirmed the 'desirability of abolishing the death penalty in all countries'.²⁶ Subsequently, the General Assembly in its resolution of 8th December 1977 'confirmed the continuing interest of the UN in the study of the question of capital punishment with a view to promoting full respect for every one's right to life'.²⁷

Since 2007 the General Assembly has passed five resolutions recalling the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and Convention on the Rights of the Child to call for international moratorium on the executions. In a series of five resolutions adopted in 2007²⁸, 2008,²⁹ 2010³⁰, 2012³¹,

²¹ UNHRC 'General Comment 6' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (1994) UN Doc. HRI/GEN/1/Rev.1, para.6.

²² Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Publishing Co., 1988), pp-429-34; also see Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy, and Process* (Cincinnati, Ohio: Anderson Publishing, 1996), pp.143-45, p.144.

²³ Ibid, para.5.

²⁴ UNHRC 'General Comment 6' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (1994) UN Doc. HRI/GEN/1/Rev.1, para.1.

²⁵ UNGA Res 2393(XXIII) (26 November 1968) UN Doc A/7218.

²⁶ UNGA Res 2857(XXVI) (20 December 1971) UN Doc A/8429.

²⁷ UNGA Res 32/61 (1977) UN Doc A/32/45 (1977).

²⁸ Moratorium on the Use of the Death Penalty, UNGA Res/62/149(14 Dec 2007) (adopted by 104 votes to 49; 31 abstentions)

and 2014³² respectively, the General Assembly urged States to respect international standards that protect the rights of those facing the death penalty, to progressively restrict its use and reduce the number of offences which are punishable by death. The UN General Assembly resolution of December 2014 on moratorium on the use of death penalty that has been supported by the record number of 117 countries in favor and 38 in opposition. India Pakistan and Bangladesh have voted against the above mentioned UN General Resolutions.

Reports of UN Rapporteurs have also reinforced the argument that capital punishment is a violation to the right to life. The special rapporteur on extrajudicial, summary or arbitrary executions from 1992 to 1999, Bacre Waly Ndiaye took the view that international human rights law seeks the abolition of the death penalty. He has stated that ‘the abolition of capital punishment is most desirable in order to fully respect the right to life.’³³ According to Ndiaye: ‘Where there is a fundamental right to life, there is no right to capital punishment’.³⁴

The judgment of various domestic courts are based upon the argument that capital punishment is a violation to the right to life: On 24 October 1990 the Hungarian Constitutional Court declared that the death penalty violates the ‘inherent right to life and human dignity as provided under Article 54 of the country's constitution’.³⁵ On June 6, 1995, the new Constitutional Court of South Africa, in a landmark judgment declared that ‘the death penalty is a violation to right to life’.³⁶ The new Constitutional Court makes several references to decisions of the Human Rights Committee,³⁷ and to judgment of the European Court of Human Rights³⁸. It is

²⁹ Moratorium on the Use of the Death Penalty, UNGA Res/63/168(18 Dec 2008) (adopted by 106 votes to 48;34 abstentions)

³⁰ Moratorium on the Use of the Death Penalty, UNGA Res/65/206(21 Dec 2010) (adopted by 109 votes to 41; 35 abstentions)

³¹ Moratorium on the Use of the Death Penalty, UNGA Res/ 67/176(20 Dec 2012) (adopted by 111 votes to 41;34 abstentions)

³² Moratorium on the Use of the Death Penalty, UNGA/Res/69/186 (18 December 2014) (adopted by 117 votes to 38;34 abstentions)

³³ UNCHR ‘The Interim Report by Special Rapporteur Mr. Bacre Waly Ndiaye’(1996) UN Doc A/51/457, para.108.

³⁴ Ibid, para.108.

³⁵ Judgment23/1990[Death Penalty Case] (X.31) AB [Constitutional Court of Hungary] ABH 1990, 89.

³⁶ *The State V. Makwanyane and Mchunu*, Case No. CCT/3/94, Judgment of 6 June 1995, para 151(1)

³⁷ Ibid, paras 63,82

³⁸ Ibid., paras 68,81,109

noteworthy that ten out of the eleven judges considered the death penalty as cruel, inhuman or degrading punishment and eight judges as a violation of the right to life.³⁹

It is argued that ‘the death penalty is morally wrong because it violates the right to life’. As international and European human rights law has moved towards the prohibition of the death penalty on the grounds that it is a violation of the right to life,

3.1.2 The Prohibition of Cruel, Inhuman and Degrading Punishment

The second argument for the abolition of capital punishment is based upon the prohibition of torture or inhuman or degrading treatment under Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Convention on Civil and Political Rights (ICCPR). Both of these International Human Rights instruments prohibit torture in the same words: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.⁴⁰ In addition to this, there are numerous regional treaties that ‘prohibit degrading and inhuman punishment’.⁴¹ Owing to cruelty and torture associated with the death penalty ‘some European scholars suggest that time has come to recognize that Article 7 of ICCPR, which states categorically that ‘no one shall be subject to torture or cruel, inhuman or degrading punishment’ should be interpreted to ban capital punishment’.⁴² Some have argued that ‘death sentence and humanity cannot be compatible’.⁴³ A Report by Juan E Mendez, the UN Special Rapporteur on Torture, calls on States to seriously reconsider whether death penalty amounts to cruel, inhuman treatment.⁴⁴

The death penalty can be considered inhuman and degrading on two grounds. Firstly the condemned prisoner undergoes a painful process lasting many years waiting for

³⁹ *The State V. Makwanyane and Mchunu*, Case No. CCT/3/94, Judgment of 6 June 1995, para.151.

⁴⁰ Universal Declaration of Human Rights (adopted 10 December 1948) U NGA Res 217 A(III) (UDHR), art.5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 7.

⁴¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art.3; American Convention of Human Rights, art.5(2); African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art.5.

⁴² Manfred Nowak, ‘Is the Death Penalty an Inhuman Punishment?’, in Theodore S. Orlin, Allan Rosas & Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Turku, Finland: Institute for Human Rights, Åbo Akademi University, 2000), pp. 27-45, p. 44.

⁴³ Danielle Mitterrand, ‘Symposium: Death Penalty from an International and Human Rights Law Perspective’ (2002) 42 *Santa Clara Law Review* 1031, p.1038.

⁴⁴ UNCHR ‘Report of the Special Rapporteur on Torture’ (2012) UN doc A/67/279, para 74.

his or her execution. This is generally known as the death row phenomenon. Secondly, the methods of executions can amount to inhuman treatments.

(A)The Death Row Phenomenon

Generally death row phenomenon refers to prolonged delay under the harsh conditions of death. European Court of Human Rights in the judgment of *Soering v. United Kingdom* separated these circumstances into two further categories: The harsh, dehumanizing conditions of imprisonment itself; the sheer length of time spent living under such conditions.⁴⁵ The psychological repercussions on the condemned prisoner due to hard physical conditions and long period of detention on death row is called 'death row syndrome'.⁴⁶ George Scott has rightly said that 'the fear of death, during those tragic days, is productive of much greater suffering than the actual experience of death'.⁴⁷ Albert Camus has portrayed the agony and suffering of death row prisoners in these words: 'Man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second'.⁴⁸

The death row phenomenon has been explicitly recognized as a violation of human rights by international and domestic tribunals 'due to element of delay, harsh conditions of death row or the cumulative effect of both the element delay and harsh physical conditions at the death row'.⁴⁹ Moreover 'the exact nature of the doctrine varies among the courts but the underlying concept remains the same'.⁵⁰ In this context, the UN Human Rights Committee, the European Court of Human Rights and domestic courts of various countries maintain that death row phenomenon is a violation of human rights.

⁴⁵ *Soering v United Kingdom* (1989) 11 EHRR 439, paras 105,106

⁴⁶ Amy Smith, 'Not Waiving but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution' (2008) 17 *The Boston University Public Interest Law Journal* 237, p.242.

⁴⁷ George Ryley Scott, *The History of Capital Punishment: Including an Examination of the Case for and Against the Death penalty* (London: Torchstream Books, 1950), p.124.

⁴⁸ Albert Camus, *Resistance, Rebellion, and Death* (New York: A Knopf, 2012), p.205.

⁴⁹ Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' (2000) 11(4) *European Journal of International Law* 833, p.838

⁵⁰ *Ibid*, p.856.

The Human Rights Committee

The Human Rights Committee dealt with a large numbers of ‘capital punishment cases submitted by inmates detained on the death row in states parties to ICCPR, mostly in Caribbean region, who claimed that their rights under the Covenant had been violated’.⁵¹ Many of them had complained that ‘the length of their detention on death row constituted inhumane, cruel and degrading treatment, contrary to Article 7 of the ICCPR’.⁵²

The Human Rights Committee takes an intermediate position on the death row phenomenon. The committee in *Pratt and Morgan v. Jamaica* does not accept delay in judicial proceedings alone as a violation to article 7 of ICCPR: ‘In principle prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary’.⁵³ In other case *Kelly v. Jamaica*⁵⁴, the Committee held that the harsh conditions experienced on the death row in Jamaica, particularly those relating to medical care, did violate Article 10 (all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person). The Committee continued its traditional stance that the prolonged periods of detention on death row do not per se constitute cruel, inhuman or degrading treatment in various cases including *Barrett and Sutcliffe v. Jamaica*,⁵⁵ *Kindler versus Canada*⁵⁶ and *Francis v. Jamaica*⁵⁷. For the first time, in the case of *Francis v. Jamaica*, the Committee recognized the death row phenomenon a violation of Article 7 and 10 of ICCPR due to delay with the

⁵¹ Markus G. Schmidt, ‘The Death Row Phenomenon: A Comparative Analysis’ in Theodore S. Orlin, Allan Rosas and Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Turku, Finland: Institute for Human Rights, Åbo Akademi University, 2000), pp.47-72, p.48.

⁵² Ibid, p.49.

⁵³ *Pratt and Morgan v. Jamaica* (Communication No.210/1986 and 225/1987), (1989) UN Doc A/44/40 222, para.13.6.

⁵⁴ *Kelly v Jamaica* (Communication No. 253/1987), (1991) UN Doc A/46/40 241, para.5.7.

⁵⁵ *Randolph Barrett and Clyde Sutcliffe v. Jamaica* (Communication Nos.270/1988 and 271/1988), (1992) UN Doc CCPR/C/44/D/271/1988, para.8.4.

⁵⁶ *Kindler v. Canada* (Communication No.470/1991), (1993) UN Doc CCPR/C/48/D 1470/1991.

⁵⁷ *Francis v. Jamaica* (Communication No.606/1994), (1995) UN Doc CCPR/C/54/D/606/1994.

combination of other factors including the role of the state in the delay, the condition of imprisonment and the mental condition of prisoner.⁵⁸

European Court of Human Rights

On the other hand, the approach of the European Court of Human Rights is different from that of Human Rights Committee. The European Court of Human Rights takes a prolonged period of delay as cruel and inhumane.⁵⁹ In the judgment of *Soering v. United Kingdom*⁶⁰ the court prohibited the extradition of Soering to the State of Virginia, where he had been charged with a capital offence, on the grounds of the long delay in Virginia between the death sentence and execution and ‘the anguish and mounting tension of living in the ever present shadow of death’.⁶¹ It is pertinent to mention that ‘it was not the death penalty itself that the court found offensive to the Convention, but rather the death row phenomenon the years-long wait for the scaffold under gruesome conditions, both physical and psychological’.⁶² This gave, as Hudson explains, ‘a seed of legitimacy for the doctrine [of death row phenomenon] in tribunals around the world’.⁶³ Simultaneously the judgment worked as a precedent and guideline for the court itself for its future decisions.

Domestic Courts

Since the 1980s, several courts and the highest domestic appellate instances have had the opportunity to address the issue of the death row phenomenon and its compatibility with national constitutional provisions or international human rights standards. For the present study, the positions of the judicial committee of Privy Council and the Supreme Court of India are particularly instructive.

The Judicial Committee of the Privy Council in *Pratt and Morgan v. Attorney General of Jamaica et al.* passed ruling as the highest appeal court of the Caribbean States that ‘we regard it as an inhuman act to keep a man facing the agony of

⁵⁸ *Francis v. Jamaica* (Communication No.606/1994), (1994) UN Doc. CCPR/C/57/1,148-58, para.9.2

⁵⁹ Manfred Nowak (n 42), p.30.

⁶⁰ *Soering v United Kingdom* (1989) 11 EHRR 439 *Soering v. United Kingdom*, App. No. 3324/76, 11 Eur. H.R. Rep. 439 (1989)

⁶¹ *Soering v UK* (1989) 11EHRR439,106.

⁶² Rhone KM Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2012), p. 243.

⁶³ Patrick Hudson (n 49), p.838.

execution over a long extended period of time'.⁶⁴ In the same judgment, the Privy Council gave threshold period of five years on the death row as a strong ground for a violation of the right against inhuman or degrading treatment.⁶⁵ To avoid overhasty executions, the Privy Council subsequently clarified in *Guerra v. Baptiste* that the period of five years was a guide 'not a limit or yard stick'.⁶⁶ In *Henfield v. Attorney General of the Commonwealth of the Bahamas*, the Privy Council observed that where international courts were not approached a period of three and half years was 'in all the circumstances be so prolonged a time as to render execution cruel or inhuman punishment'.⁶⁷

The Supreme Court of India has discussed the issue of death row 'in many cases but with different results'.⁶⁸ In February 1983, in *Vatheeswaran v. State of Tamil Nadu* observed that 'delay in executing the death sentence was cruel and inhuman and therefore violates the constitution'.⁶⁹ In February 1989, a five judge bench completely rejected the notion that 'delays in the judicial capital sentences could lead to constitutional violation'.⁷⁰ In the case of *Shatrughan Chauhan v. Union of India*, a three-judge bench of the Indian Supreme Court delivered a landmark judgment on the death penalty: holding, in particular, that an excessive delay in carrying out the death sentence was an essential mitigating factor in a plea for commutation:

we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence.⁷¹

In the *Devender Pal Singh Bhullar* case the Supreme Court of India gave two different opinions. On 12 April, 2013 the Court declined to commute Bhullar's death sentence to life imprisonment on the ground that 'he was convicted under the

⁶⁴ *Pratt v Attorney General for Jamaica and others* [1993] UKPC1, para.60

⁶⁵ *Pratt v Attorney General for Jamaica and others* [1993] UKPC1, para.85

⁶⁶ *Lincoln Anthony Guerra v. Cipriani Baptiste and Others*[1996]UKPC 3, para.29

⁶⁷ *Dwight Lamott Henfield v. Attorney General of the Commonwealth of the Bahamas* [1996] UKPC 4, para.35.

⁶⁸ Amit Bindal and C Raj Kumar, 'Abolition of the Death Penalty in India: Legal Constitutional, and Human Rights Dimensions' in Roger Hood and Surya Deva (eds.), *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford: Oxford University Press,2013).pp.123-140,p.131.

⁶⁹ *TV Vatheeswaran v The State of Tamil Nadu* AIR 1983 SC 361; 1983 SCR (2) 348.

⁷⁰ *Triveniben v. State of Gujarat* (1989)1 SCC 678; 1989 SCR (1)509, 529.

⁷¹ *Shatrughan Chauhan & Another vs. Union of India & Others*, 2014(1) SCALE437, para.54.

Terrorism and Disruptive Activities Act (TADA)'.⁷² But in *Shatrughan Chauhan v. Union of India* the Court held: 'There is no good reason to disqualify all terrorism cases as a class from relief on account of delay in execution of death sentence'.⁷³

(B) Methods of Executions

The execution itself is a 'manifestation of cruelty and torture'.⁷⁴ Many degrading and inhumane methods including 'hanging, fed to crocodiles, trampled by elephants feet, thrown over cliff, submerged in rivers, burial alive, beating to death and impalement were in vogue in different annals of history across the world'.⁷⁵ Since ancient times it has been debated which method of execution is more dignified or less painful? The axe and the sword were the main instruments of capital punishment from the earliest times. At the same time, 'the history of gallows is as old as humanity'.⁷⁶ Among the old methods of executions 'the sword was considered to be a less degrading instrument than the axe'.⁷⁷ The Romans, like the Greeks, considered beheading honorable.⁷⁸ From time immemorial, hanging has been considered a more disgraceful form of death than beheading or shooting.⁷⁹

The public execution multiply the magnitude of torture and terror involved in different methods of execution. Until the second half of the nineteenth century 'the most public places were selected to implement the executions'.⁸⁰ The purpose of public spectacle was to deliver a moral message through a dreadful example of the cost of sin and crime.⁸¹ At the same time 'rituals surrounding these punishments further magnified the reality of the unlimited extent of state power'.⁸² By the end of the eighteenth and the beginning of the nineteenth century, 'the gloomy festival of

⁷² *Devender Pal Singh Bhullar & ANR V. State of NCT of Delhi* (2013) 6SCC 195, paras 261,264.

⁷³ *Shatrughan Chauhan & Another vs. Union of India & Others*, 2014(1) SCALE437, para. 47-48

⁷⁴ Eric Prokosch, 'The Death Penalty Versus Human Rights' in the Council of Europe (eds.), *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe Publishing,1999), pp-17-27, p.18.

⁷⁵ John Laurence, *A History of Capital Punishment* (New York: Kennikat, 1971), pp.1-3.

⁷⁶ *Ibid*, p. 4.

⁷⁷ *Ibid*, p. 28.

⁷⁸ *Ibid*, p. 28.

⁷⁹ *Ibid*, p. 41.

⁸⁰ John Laurence, *A History of Capital Punishment* (New York: Kennikat, 1971), p.4.

⁸¹ Stuart Banner, *The Death Penalty: An American History* (Cambridge MA: Harvard University Press,2002), p.43.

⁸² Antony E. Simpson, *Witnesses to the Scaffold: English Literary Figures as Observers of Public Executions: Pierce Egan, Thackeray, Dickens, Alexander Smith, GA Sala, Orwell* (Lambertville, NJ: True Bill Press, 2008), p.14.

punishment started dying'.⁸³ In the second half of the nineteenth century, both in the United States of America and in Europe 'public executions were attacked as cruel'.⁸⁴ Since the promulgation of the Capital Punishment Amendment Act 1868, public executions were shifted behind the prison⁸⁵ walls in the United Kingdom. This paradigm shift was due to two main reasons: Firstly, 'it was arguably because the state's consolidation and bureaucratic competence rendered symbolic displays of might even less necessary than hitherto and less intelligible as well'.⁸⁶ Secondly, 'old penal languages and techniques came to be seen as cruel'.⁸⁷ Moreover, the functions of the old penal ceremony were no longer understood.⁸⁸ In the latter half of the nineteenth century, the British administration replicated the method of execution in India and put them behind the prisons walls.

After the Second World War, with the development of international human rights law, the efforts were launched by the UN human rights machinery 'to develop international consensus for the most humane method of execution'.⁸⁹ In this regard, in 1984, the UN Economic and Social Council declared that '[w]here capital punishment occurs it shall be carried out so as to inflict the minimum possible suffering'.⁹⁰ Professor Manfred Nowak says: 'Article 7 of International Covenant on Civil and Political Rights underlines the need for humane methods of execution and protects against aggravated methods of execution, such as stoning to death or death on the wheel'.⁹¹ The Human Rights Committee spelled out a general guideline on the method

⁸³ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Trans by Alan Sheridan (New York: Vintage, 1977), p.8.

⁸⁴ Michael H. Reggio, 'History of the Death Penalty' in Laura E. Randa (eds.), *Society's Final Solution: A History and Discussion of the Death Penalty* (New York: University Press of America, 1997), pp.1-11, p.5.

⁸⁵ Victor Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford: Oxford University Press, 1994), pp-589-90.

⁸⁶ Ibid, p.16.

⁸⁷ Ibid, 16.

⁸⁸ Gordon Wright, *Between the Guillotine and Liberty: Two Centuries of the Crime Problem in France* (Oxford: Oxford University Press, 1983), pp.167-73.

⁸⁹ Roger Hood and Carolyn Hoyle, *The death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), p.177.

⁹⁰ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty Approved by Economic and Social Council resolution 1984/50 of 25 May 1984)

⁹¹ Manfred Nowak (n 42), p.34.

of execution in its General Comment on torture: ‘the death penalty...must be carried out in such a way as to cause the least possible physical and mental suffering’.⁹²

The real challenge is to identify which method of execution causes less degree of pain. That is why the Committee had serious difficulties in defining which methods of execution cause the least possible physical and mental suffering in individual complaints against Canada involving extradition to the United States in capital punishment cases. The Committee in *Kindler v. Canada* and *Keith Cox v. Canada* arrived at the conclusion that execution by means of lethal injection was found to be below the threshold of cruel, inhuman or degrading punishment.⁹³ This position of the Human Rights Committee has been endorsed by Harold Hillman’s study of the physiology and pathology of seven different methods of execution namely shooting, hanging, stoning, beheading, electrocution, gassing and intravenous injection in different countries of the world. This study concludes: ‘All of the methods used for executing people, with the possible exception of intravenous injection, are likely to cause pain’.⁹⁴

Another inhuman aspect of the process of execution is the botched executions. It is true that since the twentieth century, executions have been highly controlled, carefully planned procedures but the probability of botched execution cannot be ruled out.⁹⁵ A botched execution involves a significant departure from the protocol of killing someone sentenced to death. Such departures include, among other things, inmates catching fire while being electrocuted, being strangled during hanging, and being administered the wrong dosages of specific drugs for lethal injections. These departures can ‘turn specified state-controlled rituals into torture, and solemn spectacles of sovereign power into spectacles of horror’.⁹⁶

⁹² Human Rights Committee, General Comment 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (1994) U.N. Doc. HRI/GEN/1/Rev.1, para.6

⁹³ *Kindler v. Canada* (Communication No. 470/1991), (1993) UN Doc CCPR/C/48/D/470/1991, para 6.8; *Keith Cox v. Canada* (Communication No.539/1993), (1994) UN Doc CCPR/C/57/1, para.17.3

⁹⁴ Harold Hillman, ‘The Possible Pain Experienced during Execution by Different Methods’ (1993) 22 *Perception* 745, p.75

⁹⁵ Austin Sarat, Katherine Blumstein and Aubrey Jones, ‘Botched Executions and the Struggle to End Capital Punishment: A Twentieth- Century Story’ (2013) 38(3) *Law and Society Inquiry* 694, p.696.

⁹⁶ *Ibid*, p. 697.

It is a fact that pain, violence and inhumanity cannot be completely dissociated from known methods of judicial execution⁹⁷ as reflected in the dissenting opinion of Andreas Mavromattes and Waleed Sadi in the *Charles Chitat Ng v. Canada* decision of the UN Human Rights Committee.⁹⁸ Juan E Mendez, the UN Special Rapporteur on Torture in Report of 2012 concludes that ‘states cannot guarantee that there is a pain-free method of execution’.⁹⁹ As Jurgen Martschukat rightly summarized: ‘Killing with kindness is an oxymoron’.¹⁰⁰ That is why it is argued that ‘execution be avoided because of how horrible it is to be executed’.¹⁰¹

3.1.3 Emergence of the Prohibition of Capital Punishment as an International Norm

International and European Human Rights law has moved towards the prohibition of the death penalty ‘on the grounds that it is a violation of the right to life and cruel and inhuman punishment’.¹⁰² The obligation to abolish capital punishment has gained the status of an international norm that is reflected in the international and regional treaties that abolish capital punishment, and the emergence of an international criminal justice system without sentence of death.

International and Regional Treaties that Prohibit Capital Punishment

International Covenant on Civil and Political Rights does not completely prohibit capital punishment. The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) abolished the capital punishment in all its forms¹⁰³ and 81 countries are its States Party.¹⁰⁴ It is pertinent to mention that optional protocol to a Treaty is an instrument of independent character and subject to

⁹⁷ Amnesty International, *When the State Kills: The Death Penalty v. Human Rights* (London: Amnesty International, 1989), p.3.

⁹⁸ *Chitat Ng v Canada* (Communication No. 469/1991), (1994) UN Doc CCPR/C/49/D/469/1991.

⁹⁹ UN Doc A/67/279 (9 August 2012), para.41

¹⁰⁰ Jurgen Martschukat, ‘No Improvement Over Electrocution or Even a Bullet: Lethal Injection and the Meaning of Speed and Reliability in the Modern Execution Process’ in Charles J. Ogletree, Jr. and Austin Sarat (eds.), *The Road to Abolition?: The Future of Capital Punishment in the United States* (New York: New York University Press, 2009), pp-252-78 at 269.

¹⁰¹ Jeffrey H. Reiman, ‘Justice Civilization and the Death Penalty: Answering van den Haag’, in Robert M. Baird and Stuart E. Rosenbaum (eds.), *Punishment and the Death Penalty: The Current Debate* (New York: Prometheus, 1995), pp. 175-205, p.191.

¹⁰² Bharat Malkani, ‘The Obligation to Refrain from Assisting the Use of the Death Penalty’ (2013) 62(3) *International & Comparative Law Quarterly* 523, p.530.

¹⁰³ The Second Optional Protocol to International Covenant on Civil and Political Rights, UNGA Res 44/128 (15 December 1989) art 1(2).

¹⁰⁴ UNCHR < <http://indicators.ohchr.org/> > accessed 25 August 2015.

independent ratification.¹⁰⁵ Besides, there are three Protocols that commit signatories to end the use of the death penalty but their jurisdiction is limited to certain regions. The regional protocols include: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty¹⁰⁶ ratified by 46 countries of Council of Europe,¹⁰⁷ Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances,¹⁰⁸ ratified by 44 Countries of Council of Europe¹⁰⁹ and Protocol to the American Convention on Human Rights to Abolish the Death Penalty¹¹⁰ ratified by thirteen countries of Organization of American States.¹¹¹

Another international instrument that prohibits capital punishment is the Convention on the Rights of the Child that states: ‘Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’.¹¹² The Convention on the Rights of the Child has been ratified by 194 countries¹¹³ except the United States, Somalia and South Sudan.

International Criminal Justice System and the Penalty of Death

Another indicator of the progress of the abolition of capital punishment is the death penalty does not conform to the values of international criminal justice system that

¹⁰⁵ United Nations Treaty Collection, Definition of key terms used in the UN Treaty Collection <https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#protocols> accessed on 26 August, 2015.

¹⁰⁶ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, arts.1- 2.

¹⁰⁷ Council of Europe <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=&DF=&CL=ENG>> accessed 25 August 2015.

¹⁰⁸ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, art 1.

¹⁰⁹ Council of Europe <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=&DF=&CL=ENG>> accessed 26 August 2015

¹¹⁰ Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 6 August 1990), OAS Treaty Series No. 73.

¹¹¹ Organization of American States <<https://www.oas.org/juridico/english/sigs/a-53.html>> accessed on 26 August 2015.

¹¹² UN Convention on the Rights of the Child’ (adopted 20 November 1989, entry into force 2 September 1990), art 37(a).

¹¹³ UNCHR <<http://indicators.ohchr.org/>> accessed on 26 August, 2015. Also see https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en&title=UNTC-publisher=

has emerged since 1990.¹¹⁴ Earlier models of international justice considered capital punishment to be appropriate for the war crimes and genocides.¹¹⁵ In this context, the Charter of the International Military Tribunal authorized the Nuremberg court to impose upon a convicted war criminal ‘death or such other punishment as shall be determined by it to be just’.¹¹⁶ Consequently, under the provision, the twenty –four men condemned to death¹¹⁷ by the Tribunal. The sentencing provisions of the Charter of the International Military Tribunal for the Far East (the Tokyo Tribunal) were similar to those adopted for the Nuremberg Trial of the Major War Criminals.¹¹⁸

None of the mechanisms of international criminal justice that has been established since 1990 enjoy the power to impose the death penalty instead the ‘maximum sentence is usually life imprisonment’.¹¹⁹ During the last decade of twentieth century, the United Nations Security Council, acting under its powers pursuant to Chapter VII of the UN Charter¹²⁰ established two ad hoc tribunals namely International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) to prosecute the perpetrators of heinous crimes committed during the conflicts in the Yugoslavia and Rwanda.¹²¹ Unlike the Nuremberg and Tokyo Military Tribunals, the statutes of ICTY and ICTR did not have power to impose the death penalty.¹²² This trend has continued with the establishment of the International Criminal Court as the Rome Statute, has only provision for awarding imprisonment for the most heinous crimes including crimes against humanity.¹²³ In 2000, the quinquennial report of the Secretary-General of the United Nations on capital

¹¹⁴ Steven Free Land, ‘International Criminal Justice and the Death Penalty’ in Jon York (eds.), *The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics* (Farnham: Ashgate, 2010), pp.193-231, p.208.

¹¹⁵ William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002), p.235.

¹¹⁶ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), (1951)82 UNTS 279, art.27.

¹¹⁷ Statistical Table of the 12 Nuremberg Trials Held under the Authority of Control Council Law No. 10, (1949) 15 TWC 1149.

¹¹⁸ Special Proclamation by the Supreme Commander for the Allied powers at Tokyo, 4 Bevans 20, as amended, 4 Bevans 27 (Charter of the Tokyo Tribunal’), Article 16

¹¹⁹ International Criminal Tribunal for former Yugoslavia (ICTY) Statute, article 24; International Criminal Tribunal for Rwanda (ICTR) Statute, article 23; Special Tribunal for Lebanon Article 24(1)

¹²⁰ United Nations Charter, Chapter VII, arts.39-51

¹²¹ UNSC Res 827 (25 May 1993) UN Doc S/RES/827

¹²² International Criminal Tribunal for former Yugoslavia (ICTY) Statute, art 24(1); International Criminal Tribunal for Rwanda (ICTR) Statute, art 23(1).

¹²³ The Rome Statute, art 77(1).

punishment noted it ‘as a significant development’.¹²⁴ It is pertinent to mention that exclusion of the death penalty from the Rome Statute does not affect the application of punishments under the domestic laws of the State Party.¹²⁵

In this context, instruments such as the international conventions, protocols and treaties enable us to affirm that the attempt to abolish the death penalty has gained a ‘kind of universal moral consensus’.

3.2 The Impact of International Law on Domestic Jurisprudence to Abolish or Restrict Capital Punishment

Unlike domestic law, international law is a horizontal rather than a vertical legal system. It lacks a supreme centralized authority¹²⁶ and is instead governed by a multitude of horizontal agreements and principles creating binding obligations between states. Under international law, treaties are not binding on states unless they choose to be bound. It means ‘the effects of treaties depend on who agrees to be bound’.¹²⁷ One of the overarching principles of international law is the principle of good faith. This principle corresponds to the binding nature of international agreements, known as *pacta sunt servanda* (meaning agreements must be respected).¹²⁸ Article 26 of the Vienna Convention on the Law of Treaties states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’.¹²⁹ This includes the rule that a party to a treaty cannot invoke provisions of its domestic law to escape the performance of its treaty obligations.¹³⁰ The Vienna Convention on the Law of Treaties prohibits the states parties to make the reservation that is ‘incompatible with the object and purpose of the treaty’.¹³¹

This includes the rule that a party to a treaty cannot invoke provisions of its domestic law to escape the performance of its treaty obligations.¹³² *The Advisory Opinion of*

¹²⁴ UN Social and Economic Council ‘Report of Secretary General on Capital Punishment and Implementation of the Safe Guards Guaranteeing Protection of the Rights of those Facing the Death Penalty’ (2000) UN Doc. E/2000/3, para.66

¹²⁵ The Rome Statute, art 80

¹²⁶ Math Noortmann, *Enforcing International Law: From Self-help to Self-contained Regimes* (Aldershot: Ashgate, 2005), p.2.

¹²⁷ Oona A. Hathaway, ‘Why Do Countries Commit to Human Rights Treaties?’ (2007) 51(4) *Journal of Conflict Resolution*, pp-588-621, p.590.

¹²⁸ Joseph Gabriel Starke, *Introduction to International Law*, 10th Edition (London: Butterworth, 1989), p. 24-25.

¹²⁹ Vienna Convention on the Law of Treaties 1969, Article 26.

¹³⁰ Ibid, art 27.

¹³¹ Ibid, art 19(3)

¹³² Ibid, art 27.

*Permanent Court of Justice in Treatment of Polish Nationals and Other*¹³³ and Article III of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts reinforce the rule that constitutional mandate is not an excuse for a treaty violation.¹³⁴ Amongst the constitutions of the three countries under study, only the Indian Constitution, under Article 51(c), obliges the state to 'foster respect for international law and treaty obligation'.

In this context, except Nepal all other south Asian countries are neither to party nor signatory to the Second Optional Protocol to ICCPR aiming at the abolition of capital punishment. As States Parties to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, South Asian Countries have some obligations on the application of capital punishment in their respective jurisdictions.

As States Parties to International Covenant on Civil and Political Rights these countries are bound to restrict the use of capital punishment and to observe some safeguards guaranteeing protection of the rights of those facing the death penalty. As discussed in Section 1, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) is phrased in a language aiming finally at the abolition of capital punishment. It does not completely abolish the capital punishment but it stipulates a number of conditions and limitations on the law authorizing the death penalty. India, Pakistan and Bangladesh have to fulfill their international obligations as states parties to the ICCPR especially in the following areas: (a) Reduce the scope of capital punishment to 'most serious crimes';¹³⁵ (b) No arbitrary deprivation of life;¹³⁶ (c) No retrospective legislation for capital punishment.¹³⁷ As States Parties to the ICCPR and Convention on the Rights of the Child, South Asian countries are bound to

¹³³ Permanent Court of International Justice, *Advisory Opinion, Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* (February 4, 1932), p.25

¹³⁴ ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc. A/56/10

¹³⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6(2).

¹³⁶ Ibid, art 6(1).

¹³⁷ Ibid, art6(2).

abolish the death penalty for crimes committed by persons below eighteen years of age.¹³⁸

3.2.1. International Human Rights Law and the Interpretation of the Phrase ‘Most Serious Crimes’

Article 6(2) of the ICCPR states that ‘in countries which have not abolished the death penalty, sentence of death may only be imposed for the most serious crimes (...)’. Since the ICCPR entered into force in 1976, the interpretation of the phrase ‘most serious crimes’ has been ‘refined and clarified by a number of UN human rights bodies in an effort to limit the number of offences for which a death sentence can be pronounced’.¹³⁹ In 1982, the UN Human Rights Committee declared in its General Comment 6: ‘the expression most serious crimes must be read restrictively to mean that the death penalty should be a quite exceptional measure’.¹⁴⁰

Two years later, for the first time, the UN Economic and Social Council (ECOSOC) attempted to define the phrase ‘most serious crimes’. ECOSOC reiterated that the countries which have not abolished the death penalty may impose it only for the ‘most serious crimes’ which means ‘intentional crimes with lethal or other extremely grave consequences’.¹⁴¹ The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty were later adopted by the UN General Assembly.¹⁴² In 1995, the fifth quinquennial report of the UN Secretary General on capital punishment talking about the ‘most serious crime’ and international crimes with lethal or other extremely grave consequences noted that the application of the death penalty be limited to the crime of murder.¹⁴³

The Human Rights Committee has reached conclusions regarding the principled content of the ‘most serious crimes’ provision that are consistent with and give further refinement to, those expressed in the safeguards and the comments of the Secretary

¹³⁸ Ibid, art 6(5); Convention on the Rights of the Child (UNGA Res.44/25 of 20 November 1989), Article 37(a).

¹³⁹ Rick Lines, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law* (London: International Harm Reduction Association, 2007), p.15.

¹⁴⁰ UNCHR ‘General Comment 6’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (1994)UN Doc HRI/GEN/1/Rev.1,para7.

¹⁴¹ United Nations Economic and Social Council ‘The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’ Res 1984/50 (May 25,1984), (1984) UN Doc E/1984/84 , Safeguard No.1

¹⁴² Human Rights in Administration of Justice, UNGA Res39/118 (14 December 1984) UN Doc A/RES/39/118

¹⁴³ United Nations Economic and Social Council, UN Doc E/1995/78, para.54,

General. Firstly it has constantly rejected the imposition of a death sentence for offences that do not result in the loss of life.¹⁴⁴ Secondly the death penalty may not be mandatory even for murder. The Committee suggests that ‘a most serious offence must involve, at a minimum, intentional acts of violence resulting in the death of a person’.¹⁴⁵ The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, summarized the interpretation of ‘most serious crimes’ in these words: ‘The death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life’.¹⁴⁶

Despite the clear interpretation of the phrase ‘most serious crimes’ by the human rights treaty bodies, the penal laws of India, Pakistan and Bangladesh are loaded with the capital offences that do not meet the threshold of the definition of the most serious crimes. Pakistan made the reservation on Article 6 of the ICCPR: The provision will be implemented to the extent that it is not repugnant to the injunction of Islam.¹⁴⁷ Currently the list of 27 capital offences in Pakistan Penal Code is not in accordance with the injunctions of Shriah. Under the Islamic jurisprudence capital offences are not more than three. The Holy Quran mentions two offences namely premeditated murder¹⁴⁸ and war against God¹⁴⁹ which are liable to capital punishment. The punishment for adultery is flogging¹⁵⁰ not stoned to death. Besides, the punishment for adultery is difficult to implement due to its stringent evidentiary requirement.¹⁵¹ (The detailed analysis of Islamic law of murder is under an independent chapter of the dissertation).

In its 1997 Concluding Observations regarding India’s compliance with the ICCPR, the Human Rights Committee recommended ‘the scope of death penalty be reduced

¹⁴⁴ UNCHR ‘Comments on Iran’s Second Periodic Report on Implementation of the ICCPR’ (3 August 1993) UN Doc CCPR/C/79/Add.25,para8; also see UNCHR ‘Concluding Observations on Kenya’s Second Periodic Report on the Implementation of ICCPR’ (29 April 2005)UN Doc CCPR/CO/83/KEN,para.13.

¹⁴⁵ *Thompson V Saint Vincent and the Grenadines* (Communication No. 806/1998(2000), paras.8.2-3

¹⁴⁶ UNCHR ‘Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions’ (2007) UN Doc A/HRC/4/20, para.65.

¹⁴⁷ United Nation Treaty Collections, Declaration and Reservations on ICCPR<https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en#35>accessed 15 July 2015.

¹⁴⁸ Al-Quran (2:178-9)

¹⁴⁹ Al-Quran (5:33).

¹⁵⁰ Al- Quran (24:2).

¹⁵¹ Al-Quran (4:15)

leading to the abolition of the death penalty altogether'.¹⁵² In the region India is the only country which has made some futile measures to reduce the scope of the death penalty. Following the judgment of the Supreme Court of India in the case of *Bachan Singh v. State of Punjab* from May 9, 1980, Indian Law provides that the death penalty may be imposed in the 'rarest of rare' cases only. On the contrary, the scope of death penalty has been increasing in India. A 2013 report of the Special Rapporteur on Extrajudicial and Summary or Arbitrary executions reveals that 'certain legislative provisions in India provide for offences that do not comply with the most serious crimes provision under international law, for example, for such offences as kidnapping not resulting in death, sabotage of oil gas pipelines and drug related offences'.¹⁵³ The Human Rights Council, in its 2009 Universal Periodic Review of human rights in Bangladesh recommended to restricting the scope of the death penalty.¹⁵⁴

Currently the penal laws of South Asian countries are loaded with capital offences related to terrorism, sex, narcotics, military and religion that do not meet the threshold of the interpretation of 'most serious crimes'.

Terrorism-Related Offenses Not Resulting in Death

The Human Rights Committee suggests that the offences related to a broad definition of terrorism¹⁵⁵ and attacks against the internal security of the state¹⁵⁶ do not fall under the definition of the 'most serious crimes'. In Pakistan, terrorism related offences that do not result in death include airplane hijacking or assisting a hijacking¹⁵⁷ and attempt to harm railway passengers such as by explosion or derailment.¹⁵⁸ In India using any special category of explosives to cause an explosion likely to endanger life or cause serious damage to property is punishable by death.¹⁵⁹ Under Special Laws of Bangladesh it is a capital offence to 'intentionally destroy or damage any property,

¹⁵² UNCHR 'Concluding Observation on India's Third Periodic Report on Implementation of the ICCPR' (4 August 1997) UN Doc CCPR/C/79/Add.81, para.20.

¹⁵³ UNCHR 'Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions' (2013) UN Doc A/HRC/23/47/Add.1, para.35.

¹⁵⁴ UNCHR 'Report of the Working Group on Universal Periodic Review, Bangladesh' (5 October 2009) UN Doc A/HRC/11/18, paras.94(16), 94(19).

¹⁵⁵ UNCHR 'Comment on Egypt's Second Periodic Report on Implementation of the ICCPR' (9 August 1993) UN Doc CCPR/C/79/Add.23, para.8.

¹⁵⁶ UNCHR 'Concluding Observations on Togo's Third Periodic Report on Implementation of the ICCPR' (28 November 2002) UN Doc CCPR/CO/76/TGO, para.10.

¹⁵⁷ Pakistan Penal Code (Amended in 2006)1860, sec. 402.

¹⁵⁸ Pakistan Railways Act 1980(amended in 1996), sec. 127.

¹⁵⁹ The Explosive Substances (Amendment) Act 2001, sec. 3(b).

whether movable or immovable, belonging to the government’¹⁶⁰ and ‘to create, alone or in a group, fear, terror, confusion or anarchy by ostentatiously displaying force or power at any place’.¹⁶¹ On 5 May 2015, the Supreme Court in the case of *Bangladesh Legal Aid and Services Trust and others v. the State and others* defended capital punishment for the heinous offences against women and children: ‘To protect the illiterate girls, women and children from the onslaught of greedy people deterrent punishment should be retained. Therefore it is difficult to lip chorus with the activists regarding the opinion of abolition of death sentence’.¹⁶² The government of Bangladesh defended capital punishment by stating that the death penalty is an ‘exemplary punishment for heinous crimes such as the throwing of acids, acts of terrorism, planned murder, trafficking of drugs, rape, and abduction of women and children’.¹⁶³

Rape Not Resulting in Death

The Human Rights Committee has also objected to imposition of the death penalty for offences related to sex including homosexual act,¹⁶⁴ adultery¹⁶⁵ and illicit sex¹⁶⁶. India is the latest country that has incorporated non-fatal rape as a death eligible offence. In this context, under the Criminal Law (Amendment) Act, 2013, repeat offenders of gang rape or rape that causes coma shall be sentenced to death.¹⁶⁷ Under the penal laws of Bangladesh, to commit an offence of rape¹⁶⁸ and ‘to kidnap a child under the age of 10 for the purpose of sexual exploitation’¹⁶⁹ are liable to capital punishment. In Pakistan the sex related capital offences include assault on a woman, intentional display of her body in public domain,¹⁷⁰ rape,¹⁷¹ and abduction of a person to submit an unnatural lust¹⁷². Pursuant to its 2008 Universal Periodic Review of human rights

¹⁶⁰ Bangladesh Explosive Substances (Amendment) Act 1987, art. 2.

¹⁶¹ Bangladesh Suppression of Terrorist Offences Act 1992, arts. 4, 5

¹⁶² Bangladesh Legal Aid and Services Trust and others v. the State and others, Criminal Appeal No.116 of 2010, p.9.

¹⁶³ UNHC, Report of the Working Group on the Universal Periodic Review: Bangladesh. Attendum (9 June 2009) UN Doc A/HRC/11/18/Add.1, p.4, recommendation 19.

¹⁶⁴ UNCHR ‘Concluding Observations on Sudan’s Second Periodic Report on Implementation of the ICCPR’ (19 November 1997) UN Doc CCPR/C/79/Add.85, para.8.

¹⁶⁵ Ibid, para.8.

¹⁶⁶ Ibid, para.8.

¹⁶⁷ Criminal Law (Amendment) Act 2013, sec.9.

¹⁶⁸ Bangladesh Oppression of Women and Children (Special Provisions) Act 1995, art.6

¹⁶⁹ Bangladesh Penal Code 1860, secs. 364(A), 368.

¹⁷⁰ Pakistan Penal Code (Amended in 2006)1860, sec. 354.

¹⁷¹ Pakistan Penal Code (Amended in 2006)1860, sec.376.

¹⁷² Pakistan Penal Code (Amended in 2006)1860, sec. 367-A.

in Pakistan, throughout the Council's final report, member nations expressed serious concern over the application of the death penalty in Pakistan, referencing its 'use to punish blasphemy and religious violations such as all non-marital consensual sex'.¹⁷³

Drug Trafficking Not Resulting in Death

The Human Rights Committee do not approve that drug offences meet the threshold of 'most serious crimes'. In its 2005 concluding observations on Thailand, the Committee noted that drug trafficking does not fall under the most serious crimes.¹⁷⁴ Affirming the stance of the Committee' the two UN Special *Rapporteurs* on Extrajudicial, Summary or Arbitrary Executions in their respective reports in 1997 and 2007 respectively say that the death penalty should be eliminated for economic and drug related offences.¹⁷⁵ Besides, the Report of Special *Rapporteur* on Torture in 2009 says that 'the imposition of the death penalty on drug offenders amounts to a violation of the right to life'.¹⁷⁶ In this regard, the UN Human Rights Committee has criticized the states that apply capital punishment to drug offenders including India¹⁷⁷ and Sri Lanka. In its Concluding Observations on Sri Lanka in 1995, the Committee specially listed drug related offences among those that do not appear to be the most serious offences under Article 6 of the Covenant.¹⁷⁸

In contravention to international guidelines, drug related offences are liable to capital punishment in India, Pakistan and Bangladesh. In Pakistan illegal trafficking of 'more than one kilogram of a drug is punishable by death'.¹⁷⁹ In India, if someone commits an offense related to the 'production, manufacture, trafficking, or financing of certain types and quantities of narcotic and psychotropic substances, he or she can be sentenced to death'.¹⁸⁰ In June 2011, the Bombay High Court, in *Ghulam Muhammad Malik v. Union of India*, invalidated mandatory sentencing under Section 31 and

¹⁷³ UNCHR 'Working Group on the Universal Periodic Review' (14 April 2008) UN Doc A/HRC/WG.6/2/PAK/2, para.23.

¹⁷⁴ UNCHR 'Comments on Thailand's Periodic Report on Implementation of the ICCPR' (8 July 2005) UN Doc CCPR/CO/84/THA, para.14.

¹⁷⁵ UNCHR 'Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (1996) UN Doc E/CN.4/1997/60; UNCHR 'Report of the Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions' (2007) UN Doc A/HRC/4/20, paras.51-52

¹⁷⁶ UNCHR 'Report of the Special Rapporteur on Torture' (2009) UN Doc A/HRC/10/44, para.37.

¹⁷⁷ UNCHR 'Concluding Observations on India's Third Periodic Report on Implementation of ICCPR' (04 August 1997) UN Doc CCPR/C/79/Add.81, para.20.

¹⁷⁸ UNCHR 'Comments on Sri Lanka's Third Periodic Report on Implementation of the ICCPR' (27 July 1995) UN Doc CCPR/C/79/Add.56, para.12.

¹⁷⁹ The Control of Narcotic Substances Act 1997, secs.6, 9.

¹⁸⁰ Narcotics Drugs and Psychotropic Substances Act of India 1985, Ch. IV, art. 31A.

found it repugnant to the right to life guaranteed under Article 21 of the Constitution of India.¹⁸¹ But the court rejected the petitioner's argument that the death penalty was disproportionate to drug trafficking offences because the crime did not result in death and was thus not among the rarest of [the] rare.¹⁸² According to the Court, an offense, 'relating to a narcotic drug or psychotropic substance is even more heinous than culpable homicide, because the latter affects only an individual, while the former affects and leaves its deleterious effect on society, besides crippling the economy of the nation as well'.¹⁸³ The Court clearly disregarded international human rights norms in determining that drug trafficking could be a 'most serious' crime.

Under the penal laws of Sri Lanka, the death penalty may be applied for trafficking, importing/exporting or possession of only 2g of heroin.¹⁸⁴ In Bangladesh and Pakistan capital punishment is prescribed for possession of 25g¹⁸⁵ and 100g¹⁸⁶ respectively. Amnesty International has named 'Sri Lanka, Pakistan and Afghanistan in the list of countries those awarded death sentences for offences related to drug in the year 2014'.¹⁸⁷ Figures released by Anti-Narcotics Force Pakistan indicate that at least 530 persons had been convicted of drug related offences during the year 2016.¹⁸⁸ Harm Reduction International report indicates 100 death row prisoners charged with drug related offences were confined in various prisons in Pakistan.¹⁸⁹

Military Offenses Not Resulting in Death

The Human Rights Committee has suggested that 'offences related to evasion of military responsibility do not meet the threshold of most serious crimes'.¹⁹⁰ Yet offences related to Military, Air Force and Navy are punishable by death in South Asian penal laws. Under Pakistan Penal Code 'abetting a successful mutiny is

¹⁸¹ Indian Harm Reduction Network (on behalf of Ghulam Muhammad Malik) v. Union of India, Crim. Writ Petition No. 1784 of 2010(11 June 2010) (Bombay H.C), para.23.

¹⁸² Indian Harm Reduction Network (on behalf of Ghulam Muhammad Malik) v. Union of India, Crim. Writ Petition No. 1784 of 2010(11 June 2010) (Bombay H.C), p.16

¹⁸³ Ibid, p.73.

¹⁸⁴ Poisons, Opium and Dangerous Drugs (Amendment) Act No.13 of 1984, sec. 54(a)

¹⁸⁵ The Narcotics Control Act 1990, sec.19.

¹⁸⁶ The Control of Narcotics Substances Act 1995, sec. 9.

¹⁸⁷ Amnesty International, *Death Sentences and Executions 2014* (London: Amnesty International, 2014), p.24.

¹⁸⁸ < http://anf.gov.pk/legal_prosecution.php > Accessed on 9 February 2017.

¹⁸⁹ Patrick Gallahue and Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2015* (London: Harm Reduction International, 2015), p. 17.

¹⁹⁰ UNCHR 'Comment on Iraq's Fourth Periodic Report on Implementation of the ICCPR' (19 November 1997) UN Doc CCPR/C/79/Add.84, para.11.

punishable by death'.¹⁹¹ Under the laws of Pakistan Army, giving up military passwords or intentionally using unassigned military passwords¹⁹², insubordination¹⁹³ and cowardice¹⁹⁴ are punishable by death. In India, the following offenses, if committed by a member of the Army, Navy, or Air Forces, are punishable by death: committing, inciting, conspiring to commit, or failing to suppress mutiny¹⁹⁵, desertion and aiding desertion. On the same pattern, in Bangladesh, offences committed by military personnel such as cowardice¹⁹⁶, espionage¹⁹⁷, aid to the enemy,¹⁹⁸ treacherous or cowardly use of a flag of truce,¹⁹⁹ false alarm in time of war²⁰⁰ and desertion in war²⁰¹ may be punished by death. No official data is available on the number of army personnel charged with the above mentioned offences and awarded capital punishment.

Offences Related to Religion not Resulting in Death

The Human Rights Committee has confirmed that apostasy²⁰² and blasphemy do not meet the threshold of most serious crimes. In India, Pakistan and Bangladesh only one offence related to religion namely blasphemy is liable to capital punishment. The laws condemning blasphemy have existed for nearly a century in South Asia under Indian Penal Code 1860 under independent chapter XV dealing with offences related to religion. Section 295, Chapter XV, prohibits the defiling of sacred places with the intention of wounding the religious sensibilities of different communities and its maximum punishment was two years imprisonment, a fine or both.²⁰³ The blasphemy law is still part of the Penal Codes of South Asian countries including Bangladesh²⁰⁴, Pakistan and India under the same section as it was under Indian Penal Code 1860 but

¹⁹¹ Pakistan Penal Code (Amended in 2006)1860, sec 132.

¹⁹² Pakistan Army Act 1952, sec. 26.

¹⁹³ Pakistan Army Act 1952, sec. 31.

¹⁹⁴ Pakistan Army Act 1952, sec. 24.

¹⁹⁵ The Air Force Act of India1950, Ch.VI, sec. 38; Army Act 1950, sec. 38; Indo-Tibetan Border Police Force Act 1992, Ch. III, sec. 20.

¹⁹⁶ Bangladesh Army Act 1952, Ch. V, art. 24(b).

¹⁹⁷ Bangladesh Army Act 1952, Ch. V, art. 24(d).

¹⁹⁸ Bangladesh Army Act 1952, Ch. V, art. 24(e).

¹⁹⁹ Bangladesh Army Act 1952, Ch. V, art. 24(f).

²⁰⁰ Bangladesh Army Act 1952, Ch. V, art. 24(g).

²⁰¹ Bangladesh Army Act 1952, Ch. V, art. 24(h).

²⁰² UNCHR 'Concluding Observations on Sudan's Second Periodic Report on Implementation of the ICCPR' (19 November 1997) UN Doc CCPR/C/79/Add.85, para.8.

²⁰³ Indian Penal Code, 1860, sec. 295.

²⁰⁴ Bangladesh Penal Code 1860, sec. 295.

with different quantum of punishment for the offence. In 1991, India increased ‘the period of punishment from two to 10 years’.²⁰⁵

In Pakistan, under the wave of Islamization during the regime of General Zia Ul Haq (1977-1988) the offence of Blasphemy was incorporated as a capital offence under section 295C. Section 295C relates to derogatory remarks in respect of the Prophet Muhammad. Under the original version of the Blasphemy Law, this offence entailed capital punishment or life imprisonment. The Federal Shariat Court²⁰⁶, on October 30, 1990, in its unanimous decision declared that punishment of life imprisonment is ‘repugnant to injunctions of Islam and alternative clause for life imprisonment be deleted from 295C’.²⁰⁷ In 1992, the decision of the court was affirmed by both the houses of the parliament, the National Assembly and the Senate.²⁰⁸

The mandatory death penalty for the offence of blasphemy is not in line with international guideline on capital punishment because it does not leave any option for the judge to consider the mitigating circumstances of the accused. That is why mandatory death penalty provisions even for the offence of murder are disapproved by the Human Rights Committee,²⁰⁹ the Judicial Committee of the Privy Council,²¹⁰ the Supreme Court of the United States of America,²¹¹ the Indian Supreme Court²¹² and the Constitutional Court of Uganda.²¹³

There have been constant demands for the ‘scraping of the blasphemy Law from religious minorities in Pakistan, national and international human rights

²⁰⁵ By the Second Amendment, Act XVI of 1991, the term of imprisonment was extended to ten years in India.

²⁰⁶ Article 203-D of the Constitution of Pakistan empowers the court to examine and decide the question, whether or not any law or provision of law is repugnant to the injunctions of Islam.

²⁰⁷ *Muhammad Ismail Qureshy versus Federation of Pakistan*, PLD-1991-FSC-10, para.67

²⁰⁸ Muhammad A. Ghazi, ‘The Law of Tawhin –i- Risalat: A Social, Political and Historical Perspective’ in Tariq Jan (eds.), *Pakistan Between Secularism and Islam: Ideology, Issues and Conflict* (Islamabad: Institute of Policy Studies, 1998), pp.209-40, p.220.

²⁰⁹ The HRC found mandatory death penalty incompatible with the ICCPR in 1995 and did so in more general terms in 2000. *Lubuto v. Zambia* (Communication No. 390/1990) (1995) UN Doc CCPR/C/55/D/390/1990/Rev.1; *Eversley Thompson v. St. Vincent and the Grenadines*, (Communication No. 806/1998, (2000) UN Doc CCPR/C/70/D/806/1998.

²¹⁰ The question of whether the mandatory death penalty violated individual human rights was settled by the Privy Council in 2002. *Reyes v. the Queen* [2002]2 App.Cas.235(P.C.), Judgment of 11 March 2002; *Queen V. Hughes*[2002]2 App.Cas.259(P.C.), Judgment of March 2002.

²¹¹ *Woodson et al. V. North Carolina*, 428 US 280(1976)

²¹² *Mithu v. State of Punjab*, 2SCR.690(1983)

²¹³ *Susan Kigula and 416 others V. Attorney General*, Constitutional Petition No.6 of 2003, Judgment of 10 June 2005

organizations²¹⁴ due to following unsavory facts: (a) since its implementation the law has been misused against the religious minorities; (b) in many cases the law was invoked to deal with a business rival, to grab property or to settle a personal score. The UN Human Rights Council working group on the Universal Periodic Review has adopted the position that ‘the death penalty for blasphemy is disproportionate and works to the detriment of religious minorities’.²¹⁵ Pakistan partially admitted this in its reply submitted to the Human Rights Council: ‘There are instances of misuse of the Blasphemy Law but it is a misunderstanding that this law is used to target minorities only’.²¹⁶ The Human Rights Council in its second Universal Periodic Review of Pakistan recommended ‘to derogate or to repeal the blasphemy law’.²¹⁷

3.2.2 ‘No Arbitrary Deprivation of Life’ and ‘Minimum Guarantees of a Fair Trial’

Article 6(1) of the International Covenant on Civil and Political Rights contains three important statements: Firstly every human being has an inherent right to life²¹⁸; secondly this right will be protected by law²¹⁹; thirdly ‘no one shall be arbitrarily deprived of his life’.²²⁰ Ramcharan writes that ‘the inherency of the right to life coupled with the primordial nature of the value protected requires that the most stringent criteria must be applied, irrespective of the country, situation or context concerned’.²²¹ Daniel Nsereko suggested that deprivation of life is arbitrary if it is made without due regard to the rules of natural justice or the due process of law, if it is made in a manner contrary to the law, or ‘if it is made in pursuance of a law which is despotic, tyrannical and in conflict with international human rights standards or international humanitarian law’.²²²

²¹⁴ Theodore Gabriel, *Christian Citizens in an Islamic State: The Pakistan Experience* (Aldershot: Ashgate, 2007), p.61.

²¹⁵ UNHRC ‘Report of Working Group on the Universal Periodic Review: Pakistan’ (14 April 2008) UN Doc A/HRC/WG.6/2/PAK/2, para. 23.

²¹⁶ UNCHR ‘Report of Working Group on the Universal Periodic Review: Pakistan’ (6 August 2012) UN Doc A/HRC/WG.6/14/PAK/1, para.74.

²¹⁷ UNCHR ‘Report of the Working Group on the Universal Periodic Review: Pakistan’ (26 December 2012) UN Doc A/HRC/22/12, para.122

²¹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6(1).

²¹⁹ Ibid, art. 6.

²²⁰ Ibid, art. 6.

²²¹ Bertrand G. Ramcharan, ‘The Concept and Dimension of the Right to Life’, in Bertrand G. Ramcharan (eds.), *The Right to Life in International Law* (Leiden: Martinus Nijhoff, 1985), pp. 1-32, p.19.

²²² Daniel D. Nsereko, ‘Arbitrary Deprivation of Life: Controls on Permissible Deprivations’ in Bertrand G. Ramcharan (eds.), *The Right to Life in International Law* (Leiden: Martinus Nijhoff, 1985), pp.245-283, p.248.

Whether a deprivation of life is arbitrary or not must be determined ultimately by reference to international human right law. The concept of arbitrariness must be judged in accordance with the standards and guarantees laid down in Article 6, 14 and 15 of the International Covenant on Civil and Political Rights.²²³ The United Nations Human Rights Committee has consistently held that if Article 14 of ICCPR is violated during the trial then Article 6 of the ICCPR is also breached. In *Carlton Reid v. Jamaica* the Human Rights Committee held that: ‘Since the final sentence of death was passed without having met the requirements for a fair trial set forth in Article 14 that is violation to right of life’.²²⁴ The UN Human Rights Committee in *Kelly v Jamaica* gave a remedy entailing the release of the applicant. The Committee observed that in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant.²²⁵

In 2007, in its General Comment 32, the Human Rights Committee ‘reaffirmed imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 have not been respected, constitutes a violation of the right to life’.²²⁶ Draft General Comment 36 defines arbitrary deprivation of life :

A deprivation of life may be authorized by domestic law and still be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality.²²⁷

The Reports of UN Special Rapporteurs also substantiate the stance of the Human Rights Committee on arbitrary deprivation of life. In this regard, in 1983, the UN Special *Rapporteur* on Summary or Arbitrary Executions said: ‘where a government has imposed a death penalty but failed to comply with the procedural safeguards presented in international law, it has violated international law and has arbitrarily deprived a person of his life’.²²⁸ In 1996, the Special Rapporteur on Extra Judicial,

²²³ Ibid, p.21.

²²⁴ *Carlton Reid v. Jamaica*, Communication No. 250/1987, UN Doc CCPR/C/39/D/250/1987 (1990) para 11.5.

²²⁵ *Kelly v Jamaica* (Communication No. 253/1987) (1991) UN Doc A/46/40 241, para. 7

²²⁶ UNCHR ‘General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’ (2007) UN Doc. CCPR/C/GC/32, para.59.

²²⁷ UNCHR ‘Draft General Comment No.36, (2015) UN Doc CCPR/C/GC/R.36/Rev.2, para.18

²²⁸ UNCHR ‘Report by Special Rapporteur on Summary or Arbitrary Executions’ (1983) UN Doc. E/CN.4/1983/16, para 55.

Arbitrary or Summary Executions reiterated that ‘proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries in accordance with the pertinent internal legal instruments’.²²⁹ Again in 2001, the Special Reporter on Extra Judicial and Summary Executions underlined the requirement of fair trial for capital cases: ‘It is imperative that legal proceedings in relation to capital offences conform to the highest standards of impartiality, competence, objectivity and independence of the judiciary, in accordance with the pertinent international legal instruments’.²³⁰

In addition, the UN Economic and Social Council (ECOSOC) passed three resolutions²³¹ prescribing safeguards regarding the application of the death penalty for those countries which have not abolished it yet. Safeguard 5 clearly expresses:

Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.²³²

India, Pakistan and Bangladesh, as States parties, have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. The Islamic Republic of Pakistan, at the time of ratification, declared that ‘the provisions of Articles 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws’.²³³ The Human Rights Committee in its General Comment 24 explained that ‘the reservations that offend peremptory norms would not be compatible with the object

²²⁹ UNCHR, Report of UN Rapporteur on Extra Judicial, Arbitrary or summary Executions (1996) UN Doc E/CN.4/1997/60, para.81

²³⁰ UNCHR, Report of Special Reporter Extra judicial and Summary Executions (2001) UN Doc E/CN.4/2001/9, para.86.

²³¹ Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by Economic and Social Council resolution 1984/50 of 25 May 1984; Implementation of the Safeguards Guaranteeing Protection of the Rights of those facing the death penalty, Res. No.1989/64 of 24 May 1989; Safeguards Guaranteeing Protection of the Rights of Those Facing the death penalty, Resolution 1996/15 of (23 July,1996).

²³² Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty Approved by Economic and Social Council Resolution No. 1984/50 of 25 May 1984, Safeguard,5.

²³³ United Nations Treaty Collection,
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec accessed on 2 September 2015.

and purpose of the Covenant’.²³⁴ The Committee further elaborates that state has no right to engage in ‘to arbitrarily deprive persons of their lives’. At the same time, Articles 6, 7 and 18 of the Covenant are among the provisions from which no derogation is allowed, according to Article 4 of the Covenant. Objecting to reservation of Pakistan for Articles 6, 7 and 18, many states parties especially Belgium, Canada, Estonia, France and Greece said that this reservation is “vague, not specified and general in nature’.

To sum up, capital punishment is an exception to the right to life as long as it is not arbitrarily imposed. If a state executes a person without meeting the highest standard of fair trial is violation of right to life and arbitrary deprivation of life.

3.2.3 The Law in Force at the Time of Commission of the Crime

The phrase ‘in accordance with the law in force of the time of the commission of the crime’ is merely a specific expression of the principle *nullum crimen, nulla poena sine lege* stated in Article 15 of the Covenant. The prohibition of punishment under retroactive legislation is an accepted principle of international jurisprudence under human rights law,²³⁵ humanitarian law²³⁶ and international criminal law.²³⁷ Moreover, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) states that ‘no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’.²³⁸

In this regard, a glaring example of violation of the ‘principle of non-retroactivity’ of criminal law is the execution of Abdul Qader Mollah, a leader of the *Jamaat-e-Islami* party in Bangladesh. After the conclusion of his trial by International Crimes

²³⁴ UNHRC ‘General Comment 24(54)’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (1994) UN Doc CCPR/C/21/Rev.1/Add.6, para.8.

²³⁵ International Covenant on Civil and Political Rights, Article 15(1); Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Safeguard 2; Universal Declaration on Human Rights, art 11; European Convention on Human Rights, art 7(1); American Convention on Human Rights 1969, art 9; African Charter on Human and Peoples 1981, art 7(2); Convention on the Rights of the Child 1989, art 40(2)(a).

²³⁶ Geneva Convention III on Prisoner of Wars 1949, art 99; Geneva Convention IV on Civilian 1949, arts 65,67; Additional Protocol I to Geneva Conventions 1977, art 75(4)(c); Additional Protocol II to Geneva Conventions 1977, art 6(2)(c).

²³⁷ International Criminal Court, the Rome Statute, art. 24.

²³⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14

Tribunal established under the International Crimes Act 1973,²³⁹ the Supreme Court converted the life imprisonment sentence awarded by the trial tribunal²⁴⁰ into the death penalty using the retroactive legislation. This glaring violation of international law has been criticized by national and international human rights organizations. Christof Heyns, UN Special *Rapporteur* on summary executions said: ‘Capital punishment may be imposed only following a trial that complied with fair trial and due process safeguards’.²⁴¹ The UN High Commissioner for Human Rights Navi Pillay said that ‘the trial had not met stringent international standards for the death penalty’.²⁴²

3.2.4 Prohibition of Juveniles’ Executions under International Covenant on Civil and Political Rights and Convention on the Rights of the Child

As states parties to the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child, South Asian countries have some obligations regarding the administration of juvenile justice. Both the International Covenant on Civil and Political Rights (ICCPR)²⁴³ and the UN Convention on the Rights of the Child²⁴⁴ prohibit capital punishment of persons under 18 years of age at the time of the commission of the crime. Article 37 of the UN Convention on the Rights of the Child provides: ‘No child shall be subjected to torture or other cruel inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by person below eighteen years’.

Despite the fact, South Asian countries are parties to the UN Convention on the Rights of the Child, juveniles are sentenced to death and executed in their respective jurisdictions. The Human Rights Committee, the UN Human Rights Council and the Committee on the Rights of the Child have shown concern regarding the compliance to the treaty law by these countries.

²³⁹ The International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973).

²⁴⁰ *The Chief Prosecutor V. Abdul Quader Molla*, ICT-BD Case No.02 of 2012.

²⁴¹ CCN, <<http://edition.cnn.com/2013/12/12/world/asia/bangladesh-islamist-hanging/index.html>> accessed on 07 April, 2015.

²⁴² Office of Human Rights Commission, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14077&LangID=E>> accessed 08 April, 2015.

²⁴³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6(5).

²⁴⁴ Convention on the Rights of the Child (UNGA Res.44/25 of 20 November 1989), Article 37(a)

In its Concluding Observations regarding India's compliance with the ICCPR, the Human Rights Committee recommended to 'abolish the death penalty for juvenile'.²⁴⁵ In the light of a recommendation made by the UN Committee on the Rights of the Child in 2000,²⁴⁶ the Indian Government promulgated the Juvenile Justice (Care and Protection of Children) Act which abolished the death penalty for individuals under the age of 18 at the time of the commission of crime.²⁴⁷ On May 18, 2015, the Indian Parliament reviewed and amended the juvenile law enforced in the country. Under the amended Juvenile Law 'the person between the age of 16 and 18 shall be tried as adults for the offences of rape and murder'.²⁴⁸ The amendment was introduced against the backdrop of the widespread outrage over the lighter punishment awarded to one of the culprits of the Delhi rape case due to his age, seventeen and a half, at the time of the commission of the crime. The provision of trying a juvenile as an adult contravenes the UN Convention on the Rights of the Child, which requires all signatory countries like India to treat every child under the age of 18 years as equal.

Pakistan as a state party to the Convention on the Rights of the Child passed Juvenile Justice System Ordinance 2000 (JJSO 2000) that defines the child in line with international standards as a person below 18 years of age.²⁴⁹ Juvenile Justice System Ordinance 2000 states unequivocally that 'no child shall be awarded punishment of death'.²⁵⁰ This is clearly in line with Article 37 of the UN Convention on the Rights of the Child.

Although the promulgation of Juvenile Justice System Ordinance 2000 was a landmark for the protection of child rights in Pakistan but there are many steps to be taken to stream line the juvenile justice system in concordance with the international standards. In this context, three major issues need to be addressed: Firstly, the legal status of the law itself; secondly the application of the law in all parts of the country; and thirdly the effective implementation of the law.

²⁴⁵ UNCHR 'Concluding Observations on India's Third Periodic Report on Implementation of the ICCPR' (4 August 1997) UN Doc CCPR/C/79/Add.81, para.20.

²⁴⁶ 'Concluding Observations of the Committee on the Rights of the Child: India' (28 January 2000) UN Doc. CRC/C/15/Add.115, para.79.

²⁴⁷ Juvenile Justice (Care and Protection of Children) Act 2000, art.16.

²⁴⁸ Juvenile Justice (Care and Protection of Children) Act, 2014, art.16(1).

²⁴⁹ Juvenile Justice System Ordinance 2000, sec.2(b).

²⁵⁰ Juvenile Justice System Ordinance 2000, sec.12.

Firstly, the legal status of the Juvenile Justice System Ordinance 2000 has been in limbo since 2005. On December 6, 2004 a full bench of the Lahore High Court, announced in its unanimous judgment that Juvenile Justice System Ordinance 2000 is ‘unreasonable, unconstitutional and impractical’.²⁵¹ The Lahore High Court argues that the JJSO creates an incentive for juvenile to commit serious crimes ‘with an understanding and assurance that they will get away with lesser sentences [which] poses a great threat and (...)grim peril to the lives of citizen at large’.²⁵² The High Court makes assertion that capital punishment is ‘most suitable deterrence’.²⁵³ In February 2005, the Supreme Court of Pakistan after admitting appeals against the Lahore High Court judgment passed a stay order and restored the Juvenile Justice System Ordinance 2000. The appeal of the Government has been pending before the Supreme Court since 2005. The Government of Pakistan must pursue the case actively in the Supreme Court to judge the real worth of the arguments of Lahore High Court against the Juvenile Ordinance. Once the Supreme Court of Pakistan decides the fate of JJSO 2000, it should be presented to Parliament to be transformed into legislation.

Secondly the Juvenile Justice System Ordinance 2000 ‘remained inapplicable in some parts of the country’.²⁵⁴ The 8th quinquennial report of the UN Secretary General on Capital Punishment reveals that ‘Pakistan’s Juvenile Justice System Ordinance 2000 requires to be implemented in all parts of the country’.²⁵⁵ Although the JJSO 2000 states unequivocally in its first section that it ‘extends to the whole area of Pakistan’.²⁵⁶ It has not been implemented to other areas of Pakistan including the Northern Areas and designated tribal areas.²⁵⁷ The Criminal Code of Pakistan does not apply to the tribal areas and Article 247(7) of the Constitution of Pakistan ‘debars the jurisdiction of the country’s High Courts and the Supreme Court from the tribal

²⁵¹ *Farooq Ahmed v. Federation of Pakistan*, PLD 2005, Lahore 15, para.14.

²⁵² *Ibid*, para.13.

²⁵³ *Ibid*, para.33.

²⁵⁴ Human Rights Commission of Pakistan, *State of Human Rights in 2007* (Lahore: Human Rights Commission of Pakistan, 2008), pp.167-168.

²⁵⁵ UN Economic and Social Council ‘Secretary General Quinquennial Report on Capital Punishment’ (2010) UN Doc E/2010/10, para.82.

²⁵⁶ *Juvenile Justice System Ordinance*, 2000, sec.1.

²⁵⁷ *The Constitution of Islamic Republic of Pakistan 1973, art.1(2)(c)*. The Constitution lists two sets of designated tribal areas, the Provincially Administered Tribal Areas (PATA) and Federally Administered Tribal Areas.

area'.²⁵⁸ The Frontier Crimes Regulation (FCR) of 1901 is the basic law in force in the Federally Administered Tribal Area (FATA). The FCR is blind to child rights. As a result children are treated on par with adults in the Federally Administered Tribal Area. However, international human rights treaties ratified by Pakistan are binding on the state in respect of all regions and all persons under its jurisdiction. It is therefore obligatory for the state to take all necessary legislative, administrative and other measures to ensure that the rights contained in the treaty are enjoyed by all within the state.

The third issue involves the effective implementation of the Juvenile Justice System Ordinance 2000 specially to determine the actual age of the accused. The ordinance empowers the juvenile court 'to constitute a medical board to determine the age of an accused at the time of the commission of offence'.²⁵⁹ But, there is a wide gap between the law in theory and practice on the ground. Recently the European Union has shown its concern over the execution of Aftab Masih in Pakistan in these words: 'His petition, alleging his juvenile status at the time of the crime and torture while in custody to extract a confession, was not given due consideration'.²⁶⁰ The national and international human rights organizations including the Justice Project Pakistan (JPP), Reprieve and Amnesty International believe that he was just 15 at the time of the commission of the offence.²⁶¹ Defending the juvenility and innocence of another death row prisoner Shafqat Hussain, convicted for the offence of murder of a seven year old boy in 2004, the human rights organizations say that he was 14 years of age at the time of commission of crime and he made a confession due to police torture. On June 5, 2015, the UN experts, Christof Heyns, the UN Special Rapporteur on extrajudicial executions, Benyam Mezmur, the Chairperson of the UN Committee on the Rights of the Child, and Juan Mendez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'called on Pakistani authorities

²⁵⁸ *The Constitution of Islamic Republic of Pakistan* 1973, art.247(7).

²⁵⁹ Juvenile Justice System Ordinance, 2000, sec.7.

²⁶⁰ 'Statement by the Spokesperson on Executions in Pakistan' (Brussels, 10 June, 2015 <http://eeas.europa.eu/statements-eeas/2015/150610_05_en.htm accessed 18 June 2016

²⁶¹ Justice Project in Pakistan <<http://www.jpp.org.pk/>> accessed on June 15, 2015; 'Pakistan Reaches 150 Hanging' <<http://www.reprieve.org.uk/press/pakistan-reaches-150-hangings-amid-plans-for-juvenile-execution/>> accessed 18 June 2015; <http://www.amnesty.org.uk/issues/Death-Penalty?gclid=CIP_2si1mcYCFZLLtAod-2MADg>.

to reverse a decision regarding the execution of Shafqat Hussain'.²⁶² His execution was postponed for the fourth time due to controversy surrounding his age at the time of commission of the offence.²⁶³ Finally he was executed on August 4, 2015²⁶⁴ and Amnesty International declared it as 'deeply sad day for Pakistan'.²⁶⁵

Bangladesh ratified the Convention on the Rights of Child in 1990 but its juvenile justice system does not fully reflect or comply with its principles. In 2009, the UN Committee on the Rights of the Child remained concerned that some aspects of domestic legislation continue to be in conflict with the principles and provisions of the Convention and 'regrets that there is no comprehensive law to domesticate the Convention'.²⁶⁶ The Children Act 1974 is the substantive law for juvenile offenders and their treatment. Article 51 of the Children Act 1974 excludes offenders under the age of 16 from the death penalty.²⁶⁷ There is no domestic law that fully excludes individuals below the age of 18 at the time of the crime. The Committee on the Rights of the Child has repeatedly expressed concern that Bangladesh law does not clearly preclude the death penalty for offenses committed under the age of 18, although Bangladesh asserts that in practice such individuals are not executed. In 2003, the UN Committee on the Rights of the Child expressed concern that 16 or 17 year olds could be sentenced to death.²⁶⁸ In 2009, the UN Committee on the Rights of Child reiterated this concern and recommended to 'clarify the definition of the child to include all persons under the age of 18'.²⁶⁹

Conclusion

²⁶² UN News Centre, 'Pakistan: UN Experts Urge Halt to Execution of Child Offender, Reinstatement of Death Penalty Moratorium' (June 5, 2015)

<<http://www.un.org/apps/news/story.asp?NewsID=51075>> accessed on 1 September 2016.

²⁶³ Jon Boone, 'Pakistani Man's Execution Postponed for Fourth Times' *The Guardian* (London, 9 June 2015) <<http://www.theguardian.com/world/2015/jun/09/pakistani-execution-shafqat-hussain-postponed-fourth-time>> accessed on 15 June 2015.

²⁶⁴ BBC <<http://www.bbc.co.uk/news/world-asia-33767835>> accessed on 1 September 2016

²⁶⁵ Amnesty International, Shafqat Hussain Execution a Deeply Sad Day for Pakistan <<https://www.amnesty.org/en/latest/news/2015/08/shafqat-hussain-execution-a-deeply-sad-day-for-pakistan/>> accessed on 1 September 2015

²⁶⁶ UNCHR, 'Concluding Observations on Bangladesh's Fourth Periodic Report on Implementation of the CRC' (26 June 2009) UN Doc CRC/C/BGD/CO/4, para.12.

²⁶⁷ Bangladesh Children Act 1974, art.2(f)

²⁶⁸ 'Concluding Observations on Bangladesh's Periodic Report on Implementation of the CRC' (27 October 2003) UN Doc CRC/C/15/Add.221, paras.33-34.

²⁶⁹ 'Concluding Observations on Bangladesh's Fourth Periodic Report on Implementation of the CRC' (26 June 2009) UN Doc CRC/C/BGD/CO/4, paras.46-47.

As an issue of international law and human rights, the death penalty is associated with two fundamental human rights, the right to life and protection against cruel, inhuman and degrading punishments. These two fundamental rights are not only enshrined in two basic instruments of international human rights namely the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) but also incorporated in all regional human rights treaties such as European Convention on Human Rights, African Charter on Human and Peoples' Rights, The American Convention on Human Rights and Arab Charter on Human Rights. With the rise of the subject of human rights after the Second World War, these two rights gained paramount importance and provided a sound legal rational to the UN human rights bodies and various domestic courts across the globe to consider capital punishment as a violation of human rights. The UN Human Rights Committee, the European Court of Human Rights, the Privy Council and domestic courts in various countries of the world have expressed their opinions in their respective judgments that capital punishment is inhuman and degrading and in violation of right to life.

International and European human rights law has moved towards the prohibition of the death penalty 'on the grounds that it is a violation of the right to life and cruel and inhuman punishment'. On the basis of these two arguments, the community of nations has adopted four Protocols that commit state parties to end the use of the death penalty in their respective jurisdictions. One is worldwide in its scope; the other three are regional instruments. The Second Optional Protocol to the International Covenant on Civil and Political Rights aims at abolishing the death penalty in all cases and is international in its scope. Currently 81 countries in the world have ratified the Protocol.²⁷⁰ Another international instrument Convention on the Rights of the Child prohibits capital punishment for juveniles under the age of 18 at the time of commission of crime. It is noteworthy that the instrument has been signed and ratified by 194 countries.

Besides, none of the mechanisms of international criminal justice that emerged after 1990 including International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court

²⁷⁰ United Nations Human Rights, Office of the High Commissioner for Human Rights, <<http://indicators.ohchr.org/>> accessed April 2, 2015.

have provisions in their statutes to impose the death penalty. Since 2007 the General Assembly has passed a series of five resolutions on international moratorium on capital punishment adopted in 2007, 2008, 2010, 2012, and 2014. The resolution of December 2014 has been supported by the record number of 117 countries in favor and 38 in opposition. It is pertinent to mention that India, Pakistan and Bangladesh have voted against moratorium in all UN General Assembly resolutions.

In short, instruments such as the international conventions, protocols, regional treaties, emergence of new international criminal justice system and the UN General Assembly resolutions enable us to affirm that the attempt to abolish the death penalty has gained a kind of universal moral consensus.

Under international law, treaties are not binding on states unless they choose to be bound. In this context, except Nepal all other South Asian countries are neither party nor signatory to the Second Optional Protocol to ICCPR aiming at the abolition of capital punishment. Article 26 of the Vienna Convention on the Law of Treaties states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’.²⁷¹ This includes the rule that a party to a treaty cannot invoke provisions of its domestic law to escape the performance of its treaty obligations.²⁷² As States Parties to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, India, Pakistan and Bangladesh have some obligations on the application of capital punishment in their respective jurisdictions:

(a) In the context of South Asian countries, the most important treaty provision relating to the death penalty is Article 6 of ICCPR that does not prohibit capital punishment, but restricts its application, and stipulates certain conditions and limitations on the law authorizing the death penalty. Under Article 6(2) of the ICCPR, countries that have not abolished capital punishment may apply it for the ‘most serious crimes’. The text of the treaty does not spell out or enumerate the most serious crimes. Over the past two decades, international jurisprudence, from a wide range of sources, has succeeded in bringing clarity to the question of which crimes can legitimately be classified as being the ‘most serious’. The phrase ‘most serious crimes’ has been interpreted unequivocally by the UN Human Rights Committee as

²⁷¹ Vienna Convention on the Law of Treaties 1969, Article 26.

²⁷² Vienna Convention on the Law of Treaties 1969, Article 27.

‘intentional crimes with the consequence of loss of life’. On the contrary, the criminal codes of these countries are overburdened with capital offences namely abduction without murder, evading military responsibilities, to damage railway property, illicit sex, apostasy, blasphemy and drug trafficking which do not meet the threshold of most ‘serious crimes’. It is pertinent to mention that Pakistan is the only country in the region that has made the reservation on Article 6 of the ICCPR: ‘The provision will be implemented to the extent that it is not repugnant to the injunction of Islam’.²⁷³ However, currently the list of 32 capital offences in Pakistan Penal Laws is not in accordance with the injunctions of *Shariah*.

(b) Article 6(1) of the International Covenant on Civil and Political Rights prohibits arbitrary deprivation of life. The concept of arbitrariness must be judged in accordance with the standards and guarantees laid down in Articles 6, 14 and 15 of the International Covenant on Civil and Political Rights. This means deprivation of life is arbitrary if it is made without due regard to the rules of natural justice or the due process of law or to fair trial standards. The UN human rights treaty bodies including the Human Right Committee, the Committee on the Rights of the Child and the Committee against Torture have pointed out in their periodic reports the glaring deficiencies in the criminal justice systems in vogue in South Asian countries. That is why there is a high risk of arbitrary deprivation of life by the state in these countries.

(c) Despite the fact, South Asian countries are parties to the International Covenant on Civil and Political rights, the Convention on the Rights of the Child, juvenile offenders below the age of eighteen are sentenced to death and executed. The Human Rights Committee, the UN Human Rights Council and the Committee on the Rights of the Child have shown their concern regarding the compliance of the treaty law by these countries. On the contrary to the U N Convention on the Rights of the Child, the Indian Parliament has amended juvenile law enforced in the country in May 2015 that allows the juvenile offenders between the ages of 16 and 18, charged with the offences of rape and murder, to be treated as adults. Currently the European Union has shown its concern over the application of the death penalty in case of Aftab

²⁷³ United Nation Treaty Collections, Declaration and Reservations on ICCPR<https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en#35>accessed 15 July 2015.

Bahadur and has requested the Government of Pakistan to respect international human rights standard on application of capital punishment.

Chapter 4

Criminal Procedure in India, Pakistan and Bangladesh and Due Process of Law

Introduction

Deprivation of life by the state apparatus tantamount to arbitrary if it is taken without observing the fundamental protections and guarantees attributed with due process of law, enshrined in Universal Declaration of Human Rights, namely prohibition of arbitrary arrest¹ and torture,² the presumption of innocence,³ fair and public hearing by an independent and impartial tribunal⁴ and right for effective defense.⁵ Subsequently in 1966, these guarantees and rights were reaffirmed and elaborated upon under Article 9, 14 and 15 of International Covenant on Civil and Political Rights that provide the essential legal framework for assessing the fairness of legal proceedings. During the last fifty years ‘a substantial jurisprudence has developed in elaborating and interpreting the right to a fair trial’.⁶

The chapter aims at identifying the systematic failures to guarantee due process of law in capital cases in South Asian countries namely India, Pakistan and Bangladesh. To evaluate the fairness of criminal process, this study will refer to norms of undisputedly legal origin including the guarantees and protections provided in the domestic constitutions and the penal laws, the human rights treaties that have been ratified by these countries and norms of customary international law. The key question is whether the gaps between the absolute minimum conditions required and practices in South Asian countries are tantamount to breach of procedural norms of fair trial. This review focuses on three areas of criminal proceedings namely collection of evidence, free legal aid and issues related to witnesses.

¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)(UDHR), art 9.

² Ibid, art 5.

³ Ibid, art11(1).

⁴ Ibid, art10.

⁵ Ibid, art11(1).

⁶ David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Boston: Martinus Nijhoff Publishers, 2001), p.111.

Criminal Proceedings in India, Pakistan and Bangladesh

India, Bangladesh and Pakistan inherited in from British colonial period several of existing laws notably the Indian Penal Code 1860, the Code of Criminal Procedure 1898, and the Indian Evidence Act 1872. In these three countries, the model of criminal justice is the adversary system based on accusatorial method.⁷ The principle that the accused is presumed to be innocent unless guilt is proved beyond reasonable doubt is of cardinal importance in the administration of criminal justice.⁸ The burden of proving the guilt of the accused is upon the prosecution.⁹ The law also provides fair opportunity to the accused person to defend himself or herself. Professor R.V. Kelkar identifies some provisions of the Criminal Procedure Code that are reflective of the elements of the inquisitorial system.¹⁰ For instance, the prosecutor cannot withdraw the case without the consent of the court.¹¹ The Court has been empowered to examine any person as a witness though such person has not been called by any party as a witness.¹²

The Code of Criminal Procedure 1898 empowers police to investigate the crime. The distinction between cognizable and non-cognizable offences also demarcates the powers of the police in respect of criminal investigation.¹³ While the police officers have the power and also the duty to investigate into all cognizable offences,¹⁴ they are enjoined not to investigate the non-cognizable offences without the order of a competent magistrate.¹⁵

The Supreme Court of India has said: ‘The police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a magistrate and this statutory power of police to investigate cannot be interfered with by the exercise of power under section 439 of Criminal Procedure Code or under

⁷ R.V. Kelkar, *Outlines of Criminal Procedure* (Lucknow: Eastern Book Company, 1977), p. 223.

⁸ *Babu Singh v. State of Punjab*, 1964 1 CriL J 566, 572; *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605; (1962) 1 Cri L J 521, 533.

⁹ *Kali Ram V. State of H.P.*, (1973) 2 SCC 808; 1973 SCC (Cri) 1048, 1059; Code of Criminal Procedure, sec 270.

¹⁰ R.V. Kelkar (n 7), p. 321.

¹¹ Code of Criminal Procedure, 1898, sec. 321.

¹² Code of Criminal Procedure, 1898, sec. 311.

¹³ R.V. Kelkar (n 7) p. 101.

¹⁴ Schedule Second of Code of Criminal Procedure enumerates cognizable and non-cognizable offences. Murder is enlisted as cognizable offence.

¹⁵ Criminal Procedure Code, 1898, sec. 155.

inherent power of the court under section 561'.¹⁶ As observed by the Law Commission of India, a magistrate is kept in the picture at all stages of police investigation but he is not authorized to interfere with the actual investigation or to direct the police how that investigation is to be conducted.¹⁷ In *King Emperor v. Khwaja Nazir Ahmed* the Privy Council has observed that 'the functions of the judiciary and the police are complementary, not overlapping'.¹⁸

4.1 The Collection of Evidence and Use of Force

Article 14(3)(g) of the International Covenant on Civil and Political Rights provides that an accused may not 'be compelled to testify against himself or to confess guilt'. In *Berry v Jamaica* the Human Rights Committee emphasized that the article 'must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt'.¹⁹ In *Conteris V. Uruguay*, the Committee found that a confession obtained after ill treatment violated the accused's right not to be compelled to confess guilt under Article 14(3)(g).²⁰ The Human Rights Committee in its General Comment stated that when considering this provision Articles 7 and 10(1) must be kept in mind and state's laws must incorporate the provision: 'Evidence provided by means of such methods or any other form of compulsion is wholly unacceptable'.²¹

The Indian Code of Criminal Procedure, 1898 defines the objective of investigation and powers of the investigating officer: 'To investigate the facts and circumstance of the case, and, if necessary, to take measures for the discovery and arrest of the offender'.²² The aim of investigating officer is to collect evidence and not to create it.²³ The Indian Supreme Court spelled out the duty of the investigating officer is not merely to boost the prosecution case with such evidence as may enable a court to

¹⁶ *Basak vs. State of West Bengal*, AIR.1963SC.447.

¹⁷ Indian Law Commission, *The Code of Criminal Procedure, 1898 vol1* (Law Com No 41, 1969), para.14.2.

¹⁸ *King Emperor v. Khwaja Nazir Ahmed* AIR 1945 PC 18, 22.

¹⁹ *Berry v. Jamaica*, (Communication No. 330/1988), (7April 1994) U N Doc. CCPR/C/50/D/330/1988, para.11.7

²⁰ *Hiber Conteris V. Uruguay*, (Communication No. 139/1983) (17 July 1985) UN Doc. Supp. No. 40 (A/40/40), para.10.

²¹ UNCHR 'General Comment 13' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (1984) UN Doc. HRI/GEN/1/Rev., para.14.

²² The Code of Criminal Procedure, 1898, sec.157.

²³ R. Deb, 'Police Investigation: A Review' in P.J. Alexander (eds.) *Policing India in the New Millennium* (New Delhi: Allied Publishers, 2002), pp.109-126, p.110.

record a conviction but also to bring out the real universal truth.²⁴ Deb underlines: ‘A heavy responsibility devolves on police of seeing that innocent persons are not charged on irresponsible or false implications’.²⁵ It is not only illegal but highly unethical for an investigating officer to resort to concoction, padding and fabrication of evidence.

On the contrary to international and domestic guidelines, investigating officers in the jurisprudence of India, Pakistan and Bangladesh do not build profile of investigation of crime on collecting evidence by employing different techniques but they resort to the third degree methods (torture) to extract confession. By the very nature of the activity, illegal violence by police is difficult to document scientifically. No official data or indicator is available to gauge the magnitude of the torture during the process of investigation. This study will employ work of judicial and quasi-judicial bodies to gauge the practice of torture prevalent in the three countries. In this context, reports of the Law Commissions and the Police Commissions constituted by the governments of these countries, and the periodic reports of human rights treaty bodies, contain enough information on the use of torture during the process of police investigation.

(A) Police Torture in Indian Sub-Continent- Relic of the Past

In the Indian Sub-continent, the torture as a major technique of investigation had a long history. Torture inflicted by the police on suspects has been a reality in all major phases of history- from the Vedic Age to the British Rule.²⁶ In fact, torture had been endemic in India long before the British extended their power beyond a few trading posts, and even possibly before the Moghal conquests.²⁷ In 1857, the Calcutta Review observed: ‘Torture in its real sense has always been resorted to in oriental countries, to obtain proof of guilt or recover stolen property’.²⁸ Keeping in view the continuity of criminal justice system inherited from the British period in India, this study makes a detailed analysis of the use of torture during the course of police investigation in the period.

²⁴ *H N Rishbud Vs. State of Delhi*, 1965 Cri L J 526(SC).

²⁵ R Deb (n 23), p.111.

²⁶ S. K. Ghosh, *Torture and Rape in Police Custody* (New Delhi: Asish Publishing House, 1993), pp.15-16.

²⁷ Malise Ruthven, *The Grand Conspiracy* (London: Weidenfeld and Nicolson, 1978), p.187.

²⁸ ‘Torture in Madras’ (1857) 29 *Calcutta Review* 441, 460.

The use of torture and coercion in Indian society was not a novel introduction brought about by British Rule. It had a long history with individuals such as English authors depicted the prevalent practice of torture against political opponents and the accused.²⁹ The proverbial cruelty of some of the Moghul rulers exercised a powerful hold on the European imagination.³⁰ In 1765, the Mughal emperor recognized British jurisdiction over Bengal, which had been under de facto British control since 1757.³¹ Under the charter granted by the British crown in 1726³², English courts had been working in the presidency towns of Bengal, Bihar and Orissa where the East India Company's factories had been established. In 1826, the Court of Directors³³ directed the Madras government to investigate reports of torture, which included one case in which the suspect had 'a rough rope charged with powdered chilies and mustard seed, and moistened with a solution of salt...tightly bound his arms'.³⁴ Simultaneously the contemporary judicial letters from Bengal endorse the reports of the abuses of the police force in Bengal.³⁵

In 1832, the Parliamentary Select Committee on East India Affairs examined the issue of torture in British-administered India. Alexander Campbell, who had been the Registrar of the *Sudder Diwani and Faujdari Adalat* (the Supreme Civil and Criminal Court, respectively) admitted the practice of torture by native officers in these words:

Under the native governments which preceded us at Madras the universal object of every police officer was to obtain a confession from the prisoner with a view to his conviction of any offence; and notwithstanding every endeavor of our European tribunals to put an end to this system, frequent instances have come before all our criminal tribunals of its use.³⁶

²⁹ N. Chevers M.D., *A Manual of Medical Jurisprudence for India* (Calcutta: 1870), pp.528,549; also see C. W. Russels and Maj. Smith, 'The Use of Torture in India' (1856) 103 *Edinburgh Review* 178.

³⁰ Malise Ruthven, *The Grand Conspiracy* (London: Weidenfeld and Nicolson, 1978), p.187.

³¹ Norman Anderson, *Law Reform in the Muslim World* (London: Athlon Press, 1976), p. 20.

³² 13Geo. I, sections 9-30.

³³ The Court of Committees performed the role of an independent administrative unit responsible for managerial direction in the Company. In 1709 its name was changed to the Court of Directors. It composed of 24 stock-holding members who were elected annually.

³⁴ Judicial Letters to Madras, 11 April, 1826, L/P&J/3/1386 in *Select Index to the General Letters From the Court of Directors in the Judicial Department, 1795-1854* (Calcutta: Bengal Secretariat Bk Depot, 1924).

³⁵ Judicial Letter from Bengal, 15 June 1830, E/4/131 in *Select Index to the General Letters From the Court of Directors in the Judicial Department, 1795-1854* (Calcutta: Bengal Secretariat Bk Depot, 1924).

³⁶ Evidence of Alexander Campbell, Select Committee on East India Company Affairs, Parliamentary Papers 12 (1832):114.

It is pertinent to mention that an important government-backed study of the practice of torture by police in the history of modern India was the Madras Torture Commission Report of 1855. The recommendations of this report were incorporated in the Indian Penal Code 1860, Police Act 1861 and Code of Criminal Procedure 1898.

In 1854, the House of Commons was rocked by allegations of torture leveled against East India Company. Mr. Danby Seymour, MP, accused the Company of using torture and coercion to get ten shillings from a man when he only had eight.³⁷ The revelations in Parliament and the press coverage that followed in 1854 made Madras Government to constitute³⁸ a three member Commission³⁹ to ‘conduct fullest and most complete investigation’.⁴⁰ Initially the mandate of the commission was to enquire into the ‘use of torture by the native servants of the state for the purpose of realizing the Government revenue’.⁴¹ However, the scope of inquiry was soon enlarged to include the alleged use of torture in extracting confessions in police cases’.⁴² The Commission worked for seven months and heard several hundred allegations from people who travelled from every part of the presidency.⁴³ The Report found the term ‘torture’ as defined by Dr Johnson “pain by which guilt is punished or confession extorted” - to be applicable to the practices prevalent in the Presidency.⁴⁴

The findings of the Commission endorse the fact that torture employed by the Police and the Revenue authorities was a historical fact. Relying on ‘old authorities’, it noted the ‘historical fact’ that ‘torture was a recognized method of obtaining both revenue and confessions’ since pre-colonial times.⁴⁵ Specifically with regard to the practice of torture for eliciting confessions, even the Government Order of the 19th of September 1854, extending the Commission's enquiry to police matters, said: ‘So deep rooted, however, has the evil been found, and so powerful the force of habit, arising from the

³⁷ Speech of Danby Semour, 11 July 1854, Hansard, 3rd ser., 135(1854): 61.

³⁸ Extract from the Minutes of Consultation in the Public Department, No. 922, dated 9th September 1854.

³⁹ The three Commissioners were E. F. Elliot, H. Stokes and J. B. Norton. Elliot had been Superintendent of police and Magistrate of Madras City from 1834-1853, and Norton had been the Advocate General. The chairman was a prominent Liberal barrister, a member of the India Reform Society.

⁴⁰ A Letter issued from the Chief Secretary, H. C. Montgomery, Public Department, Fort St. George, 9th September 1854, No. 925, para. 4.

⁴¹ Report of the Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency (Madras: Printed by H, Smith, at the Fort ST. George Gazette Press, 1855), para. 3.

⁴² Ibid, para. 4.

⁴³ Ibid, para. 6.

⁴⁴ Ibid, para. 54.

⁴⁵ Ibid, para. 14.

unrestrained license exercised in such acts of cruelty and oppression under the former rulers of this country'.⁴⁶

It was noted in the report that between 1806 and 1852 as many as 10 circular orders were promulgated by the *Faujdari Adalat* (the Supreme Criminal Court) on the subject of extorting confessions.⁴⁷ From the proceedings of the *Foujdaree Adawlat* on many cases brought to their notice by the Judges of Circuit, it is apparent that 'in cases of confessions alleged to have been given before the Police Officer, there was scarcely one in which the prisoners did not declare that they had been beaten and compelled to confess'.⁴⁸ The Commission says:

....that personal violence practiced by the native revenue and police officials generally prevails throughout this presidency, both in the collection of revenue and in police cases; but we are bound at the same time to state our opinion that the practice has of late years been steadily decreasing both in severity and extent.⁴⁹

The Commission concludes:

The police establishment has become the bane and pest of society, the terror of the community (...). Corruption and bribery reign paramount throughout the whole establishment; violence, torture and cruelty are their instruments for detecting crime, implicating innocence or extorting money.⁵⁰

The Report enumerates the different methods of torture applied by the Police to the suspects to extract confession:

Twisting rope round the arm to impede circulation; lifting up by moustache; suspending by the arms tied behind the back; searing with hot irons; placing scratching insects, such as the carpenter beetle, in the navel, scrotum and other sensitive parts; dipping in wells and rivers till the party is half suffocated; squeezing the testicles; beating with sticks; prevention of sleep; nipping the flesh with pincers; putting peppers and red chilies in the eyes, or introducing them into the private parts of men and women; these cruelties occasionally preserved in until death sooner or later ensues⁵¹

⁴⁶ Extract from the Minutes of Consultation, in the Public Department, No. 955, dated 19th September 1854, para. 3.

⁴⁷ Report of the Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency (Madras: Printed by H, Smith, at the Fort ST. George Gazette Press, 1855), para.16

⁴⁸ Ibid, para.14.

⁴⁹ Ibid, para.53.

⁵⁰ Ibid, para. 87.

⁵¹ *Report of the Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency* (Madras: Printed by H, Smith, at the Fort ST. George Gazette Press, 1855), para.67

In the words of the colonialist historian who worked in Indian Police Service, Sir Percival Griffiths, the report ‘galvanized the Madras Government into much needed action’.⁵² One of the major outcomes of the report was the recommendation by the Second Law Commission in 1855 that police should not have any authority to record the confession of an accused person. This recommendation culminated in the elaborate distrust of the police which was embodied in the Criminal Procedure Code and the Indian Evidence Act 1872.⁵³ The Indian Evidence Act, 1872, ruled all confessions made to the police or by a person in police custody to be out of the stream of evidence.⁵⁴ The Criminal Procedure Code 1898 excluded from evidence all statements recorded by the police including those of witnesses.⁵⁵

Ruthven observes ‘a model of its kind and a milestone in the law of evidence, the Evidence Act proved less than a complete remedy against torture’.⁵⁶ He further reveals that ‘actual instance of torture remained at the same level or even declined, the act supplied defense lawyers with a very effective weapon, while in no way leading to an improvement in actual police practice’.⁵⁷

During the period between the suppression of Indian Rebellion of 1857⁵⁸ and the rise of the nationalist movement at the turn of the century, relatively few accounts were printed in English. However, ‘the absence of documentary evidence does not necessarily mean that the practice itself had been abolished’.⁵⁹ A pamphlet, in 1860, summarized the proceeding of two cases of murder and torture committed by police of Burdwan, Calcutta in the judgments of the Sessions Judge and Judge of *Sudder*.⁶⁰ The pamphlet reads as follows: ‘It warned that cases of torture are notoriously of

⁵² Sir Percival Griffiths, *To Guard My People: The History of the Indian Police* (London: Earnest Benn, 1971), p. 81.

⁵³ Anandwarup Gupta, *The Police in British India 1861-1947* (New Delhi: Concept Publishing Company, 1979), p. xv.

⁵⁴ Indian Evidence Act 1872, sec 24, 25 and 26.

⁵⁵ Code of Criminal Procedure 1898, sec 162.

⁵⁶ Malise Ruthven (n 27), p. 192.

⁵⁷ *Ibid*, p. 192.

⁵⁸ A rebellion in India against the rule of the British East India Company, that ran from May 1857 to June 1858.

⁵⁹ Malise Ruthven (n 27), p. 189.

⁶⁰ *Police Torture and Murder in Bengal: Reports of Two Trials of the Police of the District of Burdwan, in August and September 1860, Confirmed by The Sudder Nizamut* (Calcutta: Savielle & Cranenburgh, 1861).

frequent occurrence in Bengal; but as no police objective can be served by taking notice of them they are looked upon with perfect placidity by the government'.⁶¹

The report of the Police Commission in 1905, appointed by Lord Curzon⁶², reveals the same sorry state of affairs: 'There is no point at which (according to the evidence before the Commission violence is not done to the spirit or letter of the law; and these abuses are practically universal'.⁶³ The commission further identifies: 'Suspects and innocent persons are bullied and threatened into giving information they are supposed to possess. The police officer, owing to want of detective ability or to indolence, directs his efforts to procure confessions by improper inducement'.⁶⁴

The language of the Curzon Commission Report was a good deal more restrained than that of the Madras report, but it would be simplistic to infer that the practice of torture had diminished proportionately. It condemned the unnecessary severity and unnecessary annoyance with which the police discharged their duties, but exonerated them of 'actual physical torture' which it stated to 'now rarely happen'.⁶⁵ In the words of Ruthven: 'Its aura, if not exactly white wash, has the flavor of bureaucratic obfuscation. The reality was that little could be done to improve things'.⁶⁶

Despite the Curzon Commission's professed belief in their comparative rarity, the disturbing allegations of actual physical torture continued to appear in the nationalist and in some cases the English press. In 1909 F.C. Mackarness published various cases of police torture in different states of India.⁶⁷ One reported notorious case that occurred in the Punjab in 1908 where Mr . Kennedy, a Session Judge, with the concurrence of three Indian assessors, had sentenced a woman, Gulab Bano, to death after she had confessed to having poisoned her husband. The Lahore High Court upheld her appeal, after a civil surgeon supplied medical evidence confirming her charges of police torture. She had been hung upside down 'from the roof of the

⁶¹Ibid, p. 2.

⁶² In 1901, Lord Curzon the Viceroy of India emphasized that police reform must take precedence over every other project

⁶³ East India Police, *Report of the Indian Police Commission and Resolution of the Government of India* (London: Printed for His Majesty's Stationary Office, 1905), para. 161.

⁶⁴ East India Police, *Report of The Indian Police Commission and Resolution of the Government of India* (London: Printed for His Majesty's Stationary Office, 1905), para.26.

⁶⁵Report of the Indian Police Commission and Resolution of the Government of India (London, 1905), para.23.

⁶⁶ Malise Ruthven (n 27), p.193.

⁶⁷ F.C. Mackarness, *Methods of the Indian Police in the Twentieth Century* (London: the National Press Agency, 1910)

village police station and a baton smeared with green chilies had been thrust up her anus'.⁶⁸ The alarming feature of the incidence is inquiry commission, despite the woman's acquittal, completely exonerated the police and attempted to discredit the opinions of the two British high court judges and the civil surgeon.⁶⁹

There are some other evidences that endorse that torture was a common practice during the British rule in India. For instance Principal Phillaur Police Training School, in India writes that 'it is common for a complaint to be made that *Thanidar* (incharge of Police Station) is not severe enough with the suspects in his cases'.⁷⁰ M Joseph Chailley, a French Scholar, visited India twice between 1900-1 and again in 1904 to study the British administrative system in India.⁷¹ The French scholar writes in detail in his book *L' Inde Britannique* on the working of the police in British India: 'they torture the accused and put pressure on the witnesses'.⁷² Despite the limited evidentiary value of confession under police custody, 'the misdeeds of the police are frequent'.⁷³ He further writes: 'I have myself seen, on more than one occasion, constables who have been imprisoned for attempts to extort confessions'.⁷⁴

The answer to the question what changed the practice of police torture to extract confession during British colonial rules in India lies in: Torture unofficially yet tacitly incorporated into judicial system. Peer argues that 'as long as torture did not directly undermine their position, the British could afford to overlook it'.⁷⁵ He further elaborates that the police were crucial to the British Raj, and to some observers, at least, helped establish the foundations of a police state.

(B) Police Torture During the Post-Colonial Period

This study reveals that there is an important element of continuity in torture employed by investigating agencies to extract confession. Upendra Baxi notes that the Commission's findings in 1855 regarding the plight of the victims are still valid

⁶⁸ Ibid, p.11.

⁶⁹ Ibid, pp.11-12

⁷⁰ James Alexander Scott, *Lectures on Practical Police Work* (Amritsar: Wazir-i-Hind Press: s.n., 192-?), p.115

⁷¹ Joseph Chailley, *Administrative Problems of British India*, Translated by Sir William Meyer (London: Macmillan, 1910), p. vii.

⁷² Ibid, p.430.

⁷³ Ibid, p.430.

⁷⁴ Ibid, p.430.

⁷⁵ Douglas M. Peers, 'Torture, the Police, and the Colonial State in the Madras Presidency' 1815-55, (1991) *Criminal Justice History*, pp-29-56, p.31.

today.⁷⁶ Police torture is as much a reality now as it was then.⁷⁷ In the Indian subcontinent, the use of force to obtain confession from suspects is known colloquially as ‘third degree’.⁷⁸ The work of different scholars and police officers reveals the practice of torture. Nitya Ramakrishnan writes that ‘we may condemn torture publically, yet deep within, we hold it indispensable to law enforcement’.⁷⁹ Upendra Baxi reveals that ‘custodial violence or torture is an integral part of police operation in India’.⁸⁰ He argues that ‘judicious use of custodial torture is seen both as necessary and justified for the performance of role obligations’.⁸¹ An Inspector General Police writes: ‘Torture is accepted as standard practice and not always discouraged by department superiors’.⁸²

Both international⁸³ and national⁸⁴ human rights NGOs unfold the practice of police torture prevalent in Bangladesh, India and Pakistan. The police of post-independence India has been charged by Amnesty International with practicing torture to extract confession.⁸⁵ Human Rights Watch also endorses the fact: ‘Soliciting a confession as one of the first step of crime investigation with information gleaned from the interrogation becoming the basis for gathering supporting evidence’.⁸⁶ Asian Human Rights Commission reports that ‘most officers honestly believe that they have a right to punish the suspect and justify torture as the only means to investigate crime’.⁸⁷ A joint Report of International Federation for Human Rights(FIDH) and Odhikar says: ‘Ill treatment, torture and extra-judicial killings in custody are common place in

⁷⁶ Upendra Baxi, *The Crisis of the Indian Legal System* (New Delhi: Vikas Publishing House, 1982), p.130.

⁷⁷ Ibid, p.131.

⁷⁸ David H. Bayley, *The Police and Political Development in India* (New Jersey:Princeton University Press,1969),p.170.

⁷⁹ Nitya Ramakrishnan, *In Custody: Law, Impunity and Prisoner Abuse in South Asia* (New Delhi: SAGE, 2013), p.4.

⁸⁰ Upendra Baxi (n 76), p.123.

⁸¹ Ibid, p.123.

⁸² M.A. K Chaudhry, *Policing in Pakistan* (Lahore:Vanguard, 1997), p.149.

⁸³ Amnesty International; Human Rights Watch.

⁸⁴ Bangladesh: Odhikar, Human Rights Reports 2009; India: The reports of National Project on Preventing Torture in India and South Asian Human Rights Document.

⁸⁵ Amnesty International, *Amnesty International Report for 1988*(London: Amnesty International,1988),pp.158-60.

⁸⁶ Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*(New York: Human Rights Watch,2009),p.83.

⁸⁷ Asian Human Rights Commission, *The State of Human Rights in Ten Asian Nations-2011*(Hong Kong: Asian Human Rights Commission, 2012), p.86.

Bangladesh’.⁸⁸ A report of the United Nations Development Programme identifies that crime investigation in Bangladesh highly relies on confession.⁸⁹ The Human Rights Commission in Pakistan also unfurls the practice of police torture in these words: ‘torture in order to obtain confession, to intimidate and terrorize is widespread, common and systematic’.⁹⁰

In 2013, a report of the United States Institute of Peace reflected that police in Pakistan employ ‘illegal detention and extract confessions through third degree-methods’.⁹¹ An empirical study of a total of 1820 victims of alleged police torture examined at the office of Surgeon Medico Legal Punjab Lahore during a period of five years (1998-2002) reveals: ‘Most of the victims at the time of examination were showing visible evidence of physical trauma’.⁹² It is noteworthy that ‘most of these victims had been detained by the police in illegal custody, for a period ranging between 1 to 2 weeks, after which they were recovered by the bailiff presented before and ordered by the court for medico-legal examination’.⁹³ The study further reveals that the victims of police torture are from the lower strata of the society. ‘The residents of rural were subjected to more violence, showing a pattern of high handedness of the poorer class by police, with no say in the society’.⁹⁴

The UN Human Rights Treaty bodies have shown concerned in their periodic reports on the use of torture by law enforcement agencies. The UN Human Rights Committee as early as 1997 has expressed its concern about the widespread use of torture by the law enforcement agencies in India: ‘It certainly appears that there is a tradition of police brutality and arbitrariness in much of the country, the degree of brutality is frequently being sufficiently unrestrained to amount to torture, often with fatal

⁸⁸ International Federation for Human Rights(FIDH) & Odhikar, *Bangladesh Criminal Justice Through the Prism of Capital Punishment and the Fight against Terrorism* (Dhaka: FIDH& Odhikar, 2010), p.16.

⁸⁹ United Nations Development Programme, *Towards Police Reform in Bangladesh Needs Assessment Report* (Dhaka: Strengthening Human Security in Bangladesh, 2004), p.35.

⁹⁰ International Federation for Human Rights(FIDH) & Human Rights (FIDH) (n 88), p.47.

⁹¹ Robert M. Perito and Tariq Parvaz, *Empowering the Pakistan Police* (Washington: United States Institute of Peace,2013), p.3.

⁹² Muhammad Aslam Chaudhry, Waseem Haider, A.H. Nagi, Zia- Ud-Din, & Z. Parveen, ‘Pattern of Police Torture in Punjab, Pakistan’ (2008) 29(4) *The American Journal of Forensic Medicine and Pathology*, pp. 309-311, p. 309.

⁹³ Ibid, p.311.

⁹⁴ Ibid, p.310.

consequences’.⁹⁵ The Human Rights Council in its concluding observations on India after the first cycle of India’s Universal Periodic Review once again expressed the same concern.⁹⁶ Submissions to the Human Rights Council also indicate that torture is a serious problem and may undermine the legitimacy of convictions in Pakistan.⁹⁷ It further reveals the horrible fact: ‘Detainees also die in custody due to torture and general abuse’.⁹⁸ In its Universal Periodic Review, the Human Rights Council recommended that Bangladesh address the issue of torture by law enforcement agencies.⁹⁹

The reports of Police Commissions, Law Commissions and observations made by the High Courts and the Supreme Courts in these countries identify the torture inflicted by investigating agencies. One State Police Commission in India had candor to acknowledge it. The Uttar Pradesh Police Commission observed:

We regret to note that old and crude methods of investigation still continue to persist. Complaints of beating, physical torture, maltreatment and harassment by Police Officials are not wanting. Most of these complaints are concerned with the investigation of cases.¹⁰⁰

Indian Law Commission Report says: ‘Even so, a large number of complaints persist, complaining of unlawful deprivation of liberty of the citizens at the hands of police and other enforcement authorities, of their resort to unlawful methods of investigation and of cruel and unusual treatment of the accused while in their custody’.¹⁰¹

In *Parmananda Pegu v State of Assam*, the Supreme Court of India noted that the confessions were involuntary, and the medical evidence and cause of death did not match the confessions made.¹⁰² The Court acquitted the accused, who was sentenced

⁹⁵ UNCHR ‘Concluding Observation of the UN Human Rights Committee on India’ (4 August 1997) UN Doc CCCPR/C/79/Add.8, para.23.

⁹⁶ UNCHR ‘Report of the Working Group on the Universal Periodic Review, India’ (23 May 2008) UN Doc A/HRC/8/26, para.7.

⁹⁷ UNCHR, Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1, (14 April 2008) UN Doc. A/HRC/WG.6/2/PAK/2, para.13.

⁹⁸ UNCHR, Compilation Prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1(14 April 2008) UN Doc A/HRC/WG.6/2/PAK/2, para.13.

⁹⁹ UNCH ‘Report of Working Group on the Universal Periodic Review: Bangladesh’ (5 October 2009) UN Doc A/HRC/11/18, para.94(20).

¹⁰⁰ Uttar Pradesh Police Commission (India), Report of the Uttar Pradesh Police Commission, 1960-61 (Allahabad: Superintendent, Printing and Stationery, 1962), para.70.

¹⁰¹ Indian Law Commission, Report on Law Relating to Arrest (Law Com No.177, 2001), p.6.

¹⁰² *Parmananda Pegu v. State of Assam* (2004) 7 SCC779

to death by the trial court, on the basis of the fact discovered that the police had extracted an involuntary confession.¹⁰³ In *Dalbir Singh v. State of U.P. and Ors*, the Supreme Court of India condemned: ‘Dehumanizing torture, assault and death in custody are so widespread as to raise serious questions about credibility of rule of law and administration of criminal justice’.¹⁰⁴ The three member bench of the Supreme Court of Pakistan ordered disciplinary action against police officers and officials who were found guilty of committing torture on accused and registering seven false cases against the parents of the accused.¹⁰⁵ In *Saifuzzaman v. State* the Supreme Court of Bangladesh expressed concern about indiscriminate arrests of innocent persons who are then subject to third-degree methods with a view to extracting confessions.¹⁰⁶

This study identifies two major causes for use of torture by the investigating agencies in the Indian Subcontinent.

4.1.2. Causes of the Use of Torture

4.1.3. Lack of Training and Modern Equipment

In the absence of sophisticated modern techniques of investigations, the law enforcement agencies adopt third degree methods to force a confession of guilt.¹⁰⁷ In the perspective of India, Police officers complain that ‘they are professionally ill equipped to meet the requirements of a force serving a modern democratic state and its people’.¹⁰⁸ In 1998, the Ribeiro Committee on Police Reforms recommended that the investigating police officers be trained in the scientific method of police investigation and not be utilized for law and order duties.¹⁰⁹ In 2009, Human Rights Watch interviewed many police officers in India that ‘admitted that use of force is their primary investigation tactic’.¹¹⁰ In 2012, the Indian Law Commission Report identifies the weakness of police’s investigation in these words: ‘Police are quite often handicapped in undertaking effective investigation for want of modern gadgets such as cameras, video equipment etc. Forensic Science laboratories are scarce and even at

¹⁰³ *Parmananda Pegu v. State of Assam* (2004) 7 SCC779

¹⁰⁴ *Dalbir Singh v. State of Utar Pradash*. (Writ Petion(Crl.) No.193 Of 2006 decided 2/3/2009), paras.8, 9.

¹⁰⁵ The Supreme Court of Pakistan, Human Rights Case No.1109-P/2009, dated 4/01/2010.

¹⁰⁶ 56 DLR(HCD) (2004) 324.

¹⁰⁷ Pramod Mishra, *Human Rights in South Asia* (Delhi: Kal Paz Publications,2000), p .271.

¹⁰⁸ Asian Human Rights Commission, *The State of Human Rights in Ten Asian Nations-2011*(Hong Kong: Asian Human Rights Commission, 2012), p.86.

¹⁰⁹ Ministry of Home Affairs India, *Report of the Ribeiro Committee on Police Reforms* (1998

¹¹⁰ Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police* (New York: Human Rights Watch,2009), p.82.

the district level, there is no lab which can render timely assistance to the investigating police'.¹¹¹ The report of Indian Law Commission in 2015 also underlines the need for reforms for 'better and more effective investigation'.¹¹²

Since 1961 the reports of Police Commissions of Pakistan highlight the need for training and skill to enhance the capacity of police for the investigation.¹¹³ Among these, Mitha Police Commission report made comprehensive recommendations to address the problems of investigation.¹¹⁴ In 2014, the National Judicial Policy Making Committee expressed its concern over the defective investigation in the criminal cases and made recommendation to the all provincial governments in Pakistan for the training and capacity building of investigating officers.¹¹⁵

The police officers equal to the rank of Inspector General in Police Service of Pakistan have highlighted the deficiency of police investigation in their books and publications. In this series, M.A.K Chaudhry writes in his memoir: 'The police regularly use torture to elicit confessions because they lack other, more sophisticated means of investigation'.¹¹⁶ Brigadier Yasin has similar opinion: 'The investigating agencies including police employ torture as a major tool for investigation because these are poorly equipped'.¹¹⁷ Another veteran police officer writes: 'The police use torture because they lack professional competence to elicit confession through intelligent interrogation'.¹¹⁸ Further he reveals: 'In the areas with higher crime rates, this trend has been somewhat ignored and thus tacitly tolerated by the police

¹¹¹ Law Commission of India, *Expedition Investigation and Trial of Criminal Cases against Influential Public Personalities* (Law Com No 239, 2012), para.2.3.

¹¹² Law Commission of India, *The Death Penalty* (Law Com No 262, 2015), para.7.1.3.

¹¹³ Police Commission headed by Mr. Justice J.B. Constantine between 1961 and 1962, the Police Commission led by Maj. General A.O. Mitha that ran from 1968 to 1970, a one man committee of Mr. G. Ahmed in 1972, the Foreign Experts Committee composed of Romanian Police Experts in 1976, the Police Reforms Committee chaired by Mr. Rafi Raza, also in 1976, the Police Committee headed by Mr. Aslam Hayat in 1985 and finally the Police Reforms Implementation Committee, under M.A.K. Chaudhry, in 1990. Not one of the major recommendations put forward by these committees was put in place until 2002.

¹¹⁴ Pakistan Police Commission Report, *Mitha Police Commission Report* (1970), para.45.

¹¹⁵ Pakistan Law and Justice Commission, *Annual Report 2012-14* (Islamabad: Pakistan Law Commission, 2014), p. 68.

¹¹⁶ M.A. K Chaudhry (n 82), p.9.

¹¹⁷ Brig(R) Muhammad Yasin, *District and Police Systems in Pakistan* (Islamabad: Vanguard, 1999), p.167.

¹¹⁸ Zubair Nawaz Chattha & Sanja Kutnjak Ivkovic, 'Police Misconduct: The Pakistani Paradigm' in Carl B. Klockars, Sanja Kutnjak Ivkovic and M.R. Haberfeld (eds.), *The Contours of Police Integrity* (London: Sage, 2004), pp-175-190, p.176

administrators and the governments'.¹¹⁹ The Report of Asia Society edited by leading police experts in Pakistan and the United States reflect: 'Professional skill of Police in investigating crime must be sharpened'.¹²⁰

A report compiled by United Nations Development Programme on police reform in Bangladesh reveals that 'forensic evidence such as fingerprints and detailed crime scene sketching or photography is rarely used to support investigation'.¹²¹ The report further depicts, much of equipment of the Chief Chemical Examiner's Office is 'significantly outdated' the laboratory has 'no serology or DNA capacity'.¹²²

4.1.3. Abuse of Power to Arrest and Investigate

Ironically, the Police Act of 1861 (along with the Police Rules of 1934), a colonial legacy that was meant to control people rather than serve them,¹²³ remained applicable in India, Pakistan and Bangladesh as a central law (with very minor modifications).¹²⁴ The British, instead of following the model of the London Metropolitan Police set up in 1829, a centralized, paramilitary police system designed for colonial Ireland was introduced in Colonial India.¹²⁵ This model was obviously suitable for India as the colonial state needed a colonial police, answerable only to itself not to the people.¹²⁶ David Arnold argues that the colonial police structure was meant to be an institutional realization of the Benthamite ideal of the Panopticon.¹²⁷

¹¹⁹ Ibid, p.176.

¹²⁰ Hassan Abbas, *Stabilizing Pakistan Through Police Reforms* (New York: The Asia Society, 2012), p.15.

¹²¹ United Nations Development Programme, *Towards Police Reform in Bangladesh Needs Assessment Report 2003* (Dhaka: Strengthening Human Security in Bangladesh, 2004), pp.34-35.

¹²² Ibid, p.35.

¹²³ Michael E. Brogden, 'The Emergence of Police-The Colonial Dimension' (1987) 27(1) *British Journal of Criminology* 4, pp-4-14; Arvind Verma, *The Indian Police: A Critical Evaluation* (New Delhi: Regency Publications, 2005), p.8.

¹²⁴ Farrukh Hakeem, 'Emergence of Modern Indian Policing: From *Mansabdari* to Constabulary' in M.R.Haberfeld & Ibrahim Cerrah (eds.) *Comparative Policing: The Struggle for Democratization*, pp-169-179, p.173. In 2002, Pakistan is the first country who introduced reform-oriented Police Order but it is implemented partially in province of Punjab and KPK but in Sind and Baluchistan police works under Police Act 1861.

¹²⁵ Dilipik K. Dass & Arvind Verma, 'The Armed Police in the British Colonial Tradition' (1998) 21(2) *Policing: An International Journal of Police Strategies & Management*, pp-354-367, p.354.

¹²⁶ David Arnold, *Police Power and Colonial Rule* (Delhi: Oxford University Press, 1986), p.29.

¹²⁷ Ibid, p.29.

Indian Penal Code 1860 and Code of Criminal Procedure 1898 empower police to arrest¹²⁸, arrest without warrant¹²⁹, detain¹³⁰, to arrest on suspicion¹³¹ and to conduct investigation.¹³² Section 54 of Code of Criminal Procedure empowers police to arrest without a warrant from magistrate when there is ‘reasonable suspicion’ or ‘credible information’ of the commission of a cognizable offence¹³³ in nine situations. If the police are unable to complete the investigation within 24 hours from such an arrest, section 167 provides for further detention by the police up to a maximum of 15 days, subject to the orders of a magistrate.¹³⁴ Even a magistrate is powerless to authorize further police custody beyond 15 days on the whole.¹³⁵

The practice is different from the theory, the investigation starts with the arrest of suspect instead of collecting all possible evidence before the arrest.¹³⁶ S. K. Ghosh summarizes the working of police: ‘the average Indian method was and to a certain extent even today is that the investigating officer finds rightly or wrongly his suspect, extort a confession from him and thus proceeds to search for facts to fit him’.¹³⁷ Thus police makes a clever blend of the two detestable methods, namely ‘third degree’ and ‘padding’.¹³⁸ The police officers consider 24 hours are not enough ‘to interrogate a suspect thoroughly and courts do not give police remand easily’.¹³⁹ That is why police, in majority of cases, makes the formal entry of the arrest of the suspects after completion of the process of investigation. First Information Report (FIR),¹⁴⁰ as the name reflects, is only a first step before the actual investigation. However, there is a definite tendency by police officers to file FIRs only after the investigation, once the suspect culprit has been identified. It is condemnable to take people in police vehicles

¹²⁸ The Code of Criminal Procedure 1898, secs.47, 49.

¹²⁹ The Code of Criminal Procedure 1898, Sec 54; Indian Criminal Procedure Code 1973 (amended in 2010), sec 41(a).

¹³⁰ The Code of Criminal Procedure 1898, sec.157.

¹³¹ Ibid, sec165.

¹³² Ibid, secs.154-176.

¹³³ The Code of Criminal Procedure, 1898 sec.54 Cr. P.C 1898, A list of offences under the second schedule of criminal procedure.

¹³⁴ The Code of Criminal Procedure, sec. 167.

¹³⁵ The Code of Criminal Procedure, sec.167(2).

¹³⁶ International Federation for Human Rights(FIDH) & Odhikar, *Bangladesh Criminal Justice Through the Prism of Capital Punishment and the Fight against Terrorism* (Dhaka: FIDH& Odhikar, 2010), p.15.

¹³⁷ S. K Ghosh (n 26), p.18.

¹³⁸ Ibid, p.18.

¹³⁹ Vijay Karan, India’s System of Policing: Need for Urgent Reforms in P.J. Alexander (eds.) *Policing India in the New Millennium* (New Delhi: Allied Publishers, 2002), pp.262-276, p.268.

¹⁴⁰ Code of Criminal Procedure 1898, sec.154.

and to subject them to interrogation in police stations without sufficient evidence collected against them.¹⁴¹

This unfettered power to arrest is not only exploited by the police but also the complainant especially in the charges of offence of murder. Whenever an offence of murder is committed, the immediate or extended family of the victim has some suspicion regarding the murderer; it is customary for the police to urge them to add as many names as they want to the list of potential suspects. Ultimately, 'those people who claim to be innocent are dropped from the list after they pay off the police'.¹⁴² The implied objective of throwing out a wide net is to arrest ten people in order to have a chance to catch the actual culprit.¹⁴³

The reports of the Law Commission of these countries also identify the abuse of power by police under section 54 of Code of Criminal Procedure. Indian Law Commission Report reveals the fact: 'Complaints of abuse of power and torture of suspects in custody by the Police and other law enforcing agencies having power to detain a person for interrogation in connection with investigation of an offence are, on rise'.¹⁴⁴ As a matter of fact members of the weaker or poor sections of society are arrested informally and kept in police custody for days together without any entry of such arrests in police record. The Indian Law Commission Report 177 noted that the Code confers 'a vast sometime absolute and on some other occasion, an unguided and arbitrary power of arrest upon police'.¹⁴⁵ The same report shows its concern that arrest of a person 'without warrant and without an order from magistrate seriously invades the liberty of a citizen'.¹⁴⁶ Pakistan Law Commission, in its Report No.49 also observes that in most of cases, 'police officer arrested the person without collecting any material connecting with commission of the offences'.¹⁴⁷

The Supreme Court and the High Court of these countries had made important court directives on custodial accountability. The Lahore High Court in *Khizer Hayat v. the*

¹⁴¹James Vadackumchery, *Indian Police and Miscarriage of Justice* (New Delhi: Alpha Publishing Corporation, 1997), p.6.

¹⁴²Zubair Nawaz Chattha & Sanja Kutnjak Ivkovic (n 118) p.179.

¹⁴³ Human Right Commission and International Federation for Human Rights (FIDH), *Slow March to Gallows: Death Penalty in Pakistan* (Lahore: Human Right Commission of Pakistan, 2007), p.48.

¹⁴⁴ Law Commission of India, *Custodial Crimes* (Law Com No 152, 1994), para 1.1.

¹⁴⁵ Law Commission of India, *Law Relating to Arrest* (Law Com No 177, 2001), p. 24.

¹⁴⁶ Ibid, p.24.

¹⁴⁷ Pakistan Law Commission, *Examination of Sections 54 & 167 of Code of Criminal Procedure 1898* (Law Com No 49), p.2.

State observed: ‘Merely because there is power to arrest, it is by no means necessary that the police should in all cases take the suspect into custody’.¹⁴⁸ The Lahore High Court forwarded its judgment in the case of *Allah Rakhi v. the State* to the Secretary of the Law Commission of Pakistan to consider the incorporation of a new section in the Criminal Procedure Code to minimize the probability of misuse of power by Police.¹⁴⁹ The Supreme Court of Bangladesh, in *Saifuzzaman v. State*, expressed concern about indiscriminate arrest of innocent persons who were then subjected to third-degree methods with a view to extracting confession.¹⁵⁰ The High Court Division of the Bangladesh also explained that before the arrest the police officer must have had ‘actual knowledge of underlying facts that lead to the suspicion’.¹⁵¹ The Indian Supreme Court in *D.K. Basu v. West Bengal* issued a list of eleven guidelines for police to follow when arresting someone.¹⁵² These guidelines were never followed as Indian Law Commission Report 180th noted: ‘Can anybody assure that in India, the Police invariably would inform a person in detention that he has a right to call a lawyer at the time of his interrogation’.¹⁵³

4.1.4. Insufficient Legal Protections against Torture during Police Investigation

Firstly a statement made by an accused person to the police in the course of investigation is wholly inadmissible.¹⁵⁴ The Indian Evidence Act 1872 reinforces the bar against admissibility of confessional statement by the accused to the police.¹⁵⁵ No statement made to the police by anyone, whether witness or suspect, is admissible as evidence¹⁵⁶ and offer of any threat or inducement to elicit a statement or information is barred.¹⁵⁷ However a suspect’s statement to police is admissible as evidence if it

¹⁴⁸ *Khizer Hayat V. The State*, PLD 2005 Lahore 470.

¹⁴⁹ Pakistan Law Commission, *Examination of Sections 54&167 of Code of Criminal Procedure 1898* (Law Com No 49), p.1.

¹⁵⁰ 56 DLR(HCD) (2003)363.

¹⁵¹ *Blast and others v. Bangladesh*, 55(2003) DLR.

¹⁵² *D.K. Basu V. State of West Bengal* (1997)1 SCC 416.

¹⁵³ Law Commission of India, *Report on Article 20(3) the Constitution of India and Right to Silence* (Law Com No.180,2002), p.11.

¹⁵⁴ Sections 162,163,172 and 173 of the Code of Criminal Procedure 1898 read with Sections 24, and 25 of the Indian Evidence Act 1872 provided rules of conduct and procedure to prevent torture of persons under interrogation. Section 330 and 331 of Indian Penal Code 1860 made voluntary causing hurt to extort confession or information or compel restoration of property punishable.

¹⁵⁵ Indian Evidence Act 1872, sec. 24.

¹⁵⁶ The Code of Criminal Procedure, sec.162.

¹⁵⁷ The Code of Criminal Procedure, sec. 163

leads to ‘discovery of fact’.¹⁵⁸ It is indirect route that leads to police reliance on confession. The Indian Law Commission report refers it as ‘fruits here posed no problem’.¹⁵⁹

Another remedy to police torture is the detained person has the right to ‘request the magistrate for a medical examination by a medical officer’.¹⁶⁰ The Magistrate before whom an arrested person is produced shall enquire whether he has any complaint of torture or maltreatment in police custody and inform him that he has right to be medically examined.¹⁶¹ The medical legal report is only a yard stick to prove or refute the allegation of torture and inhuman and degrading punishment during the custody.

It is evident that these two statutory protections could not restrain police to use force to extract confessions since British rule in India. The Indian Law Commission recognizes the fact: ‘The existing law is inadequate and ineffective in dealing with the custodial crimes and in many cases the erring officers go scot free on account of the complainants inability to prove the case against them’.¹⁶² The report further reveals: ‘torture under police custody is extremely difficult to prove due to two reasons the victim is afraid to speak out; and secondly, no third party may ordinarily be present who can give oral testimony’.¹⁶³ To address the issue of paucity of evidence and probable escape of culprit, the Law Commission of Bangladesh has recommended ‘raising a presumption against the custodial official if injury or death in custody is established’.¹⁶⁴

Despite their treaty obligations, the Governments in the Indian Subcontinent are reluctant to criminalize torture in custody which provides impunity to law enforcement agencies. Torture is not defined in domestic legislation even the Constitution. Domestic legislation in accordance with international convention on torture is overdue in these countries.

¹⁵⁸ The Indian Evidence Act 1872, sec.27.

¹⁵⁹ The Law Commission of India, *Review of the Indian Evidence Act, 1872* (Law Com No.185, 2003), p.156; also see *Bodh Raj V. State of Jammu and Kashmir*, 8SCC 45 (2002)

¹⁶⁰ *The Code of Criminal Procedure 1860*, sec.54; Indian Code of Criminal Procedure (Amendment) Act 2008, sec.54.

¹⁶¹ *Sheela Barse v. State of Maharashtra* (1983) 2SCC 96, pp.102-104.

¹⁶² Law Commission of India, *Custodial Crimes* (Law Com No 152, 1994), para 1.6.

¹⁶³ *Ibid*, para (2.8).

¹⁶⁴ The Law Commission of Bangladesh, *Final Report on the Evidence Act, 1872, Relating to Burden of Proof in Cases of Torture on Persons in Police Custody* (Law Com No 17, 1998); also see *Blast v. Bangladesh*, 55 DLR (2003) 363.

In short use of third degree method (torture) by police to extract confession has been a long history in the Indian Subcontinent. The judicious use of custodial torture is seen both as a necessity and justification for police operation. Owing to a lack of forensic support and the proper training of staff, torture is considered as a cheap and effective means to secure a confession. Evidence obtained as a result of torture, whether the torture generates the 'lead' fatally taints the death penalty trial. This defacto practice of police torture multiplies the risk of prosecuting the innocent and the weak of the society.

4.2 The Right to Access to Legal Council

The right to defend one-self is an essential part of the right to a fair trial in criminal and civil proceedings and serves, among other purposes, to ensure that the principle of equality of arms is upheld. In the international legal framework, Article 14 (3) (d) of International Covenant on Civil and Political Rights requires:

to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

According to Professor Manfred Nowak, the right can be further divided into an individual's rights to defend oneself in person; to choose one's own council; to be informed of the right to counsel and to receive free legal assistance.¹⁶⁵ In capital cases, the right to counsel applies to all stages of criminal proceedings including the preliminary investigation and pretrial detention.¹⁶⁶ The Human Rights Committee has observed in its various decisions that cases involving a death sentence clearly require counsel in the interests of justice. In *Pinto v. Trinidad and Tobago*, it stressed that 'legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice'.¹⁶⁷ In *Kelly v. Jamaica*, it expressed the opinion that 'while Article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once

¹⁶⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (Kehl: N. P. Engel, 2005), pp. 337-338.

¹⁶⁶ Ibid, p.339.

¹⁶⁷ *Daniel Pinto v. Trinidad and Tobago* (Communication No. 232/1987), (1990) UN Doc. CCPR/C/39/D/232/1987, para.12.5.

assigned, provides effective representation in the interests of justice'.¹⁶⁸ In *Reid v. Jamaica*, the Committee held that 'the State party should have appointed another lawyer for his defense or allowed him to represent himself at the appeal proceedings'.¹⁶⁹ In *Robinson Lavende v. Trinidad and Tobago*, the Committee reiterated its standpoint that 'it is imperative for legal aid to be available to a convicted prisoner under sentence of death, and this principle applies to all stages of the legal proceedings'.¹⁷⁰

The Human Rights Committee has recognized that the right to counsel means the right to effective counsel and must be qualified to represent and defend the accused.¹⁷¹ The Committee expressed concern at the inadequate system of legal aid representation in Jamaica, finding that such inadequacy in capital cases 'amounts to a violation of article 6 and 14 of the Covenant'.¹⁷² In 1996, the UN Special Rapporteur on Extra Judicial, Summary or Arbitrary Execution stated 'all dependents facing the imposition of capital punishment must benefit from the service of a competent defense counsel at every stage of the proceedings'.¹⁷³ Interpreting the right to counsel under the European Convention on Human Rights, the European Court of Human Rights held that the State must also provide effective counsel and has an obligation to see that the appointed counsel is carrying out his or her duties adequately.¹⁷⁴

In addition to international guidelines, the constitutions of India¹⁷⁵ and Pakistan¹⁷⁶ provide for a right to defend through legal counsel of his or her choice. The Criminal Procedure Code 1898 empowers the trial court to provide legal aid to the person

¹⁶⁸ *Paul Kelly v. Jamaica* (Communication No. 253/1987) (1991) UN Doc. CCPR/C/41/D/253/1987, para.5.10.

¹⁶⁹ *Carlton Reid v. Jamaica*, (Communication No. 250/1987) (1990) UN Doc. CCPR/C/39/D/250/1987, para.11.4.

¹⁷⁰ *Robinson LaVende v. Trinidad and Tobago* (Communication No. 554/1993) (1997) UN Doc. CCPR/C/61/D/554/1993, para.5.8.

¹⁷¹ *Elena Beatriz Vasilskis v. Uruguay*, (Communication No. 80/1980) (1983) UN Doc. Supp. No. 40 (A/38/40) at 173 (1983), para.9.3 & para.11.

¹⁷² UNCHR 'Concluding Observations of the Human Rights Committee: Jamaica' (19 November 1997) UN Doc. CCPR/C/79/Add.83, para.14.

¹⁷³ UNCHR 'Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (24 December 1996) UN DOC. E/CN.4/1997/60, para.81.

¹⁷⁴ *Artico v. Italy* (13 May 1980), European Court of Human Rights, Series A, No.37, para.33

¹⁷⁵ Constitution of India, art. 22(1).

¹⁷⁶ Constitution of Pakistan, art 10(1)

charged with an offence punishable by death.¹⁷⁷ Despite constitutional and statutory provisions the legal aid system remained underdeveloped in the judicial system of India, Pakistan and Bangladesh.

India violates an individual's right to legal representation at all stages for those facing capital punishment.¹⁷⁸ The judiciary has played an active role in interpreting the meaning and scope of legal aid in India.¹⁷⁹ By the late 1970s, the Supreme Court in *Sunail Batra v. Dehli Administration*¹⁸⁰ recognized the right to legal representation as a fundamental right by a liberal interpretation of Article 21 of the constitution which relates to protection of life and liberty. The higher judiciary in India has not only realized the magnitude of this issue but in many cases namely *Khatri and Others v. State of Behar*¹⁸¹ and *Suk Das v. Union Territory of Arunachal Pradesh*¹⁸² has issued directions to the states to ensure the provision of legal aid. In *Hussainara Khatoon v. Home Secretary*,¹⁸³ the State of Bihar Justice Bhagwati explained that denial of the right to legal aid amounts to denial of equal justice and equal access to justice. In *Sukh Dass v. Union Territory of Arunachal Pradesh* the Supreme Court of India observed that conviction of an accused in a trial in which the accused was not provided legal aid would be set aside as being in violation of Article 21 of the Constitution of India.¹⁸⁴ In *Babubhai Udesinh Parmar v. State of Gujrat*¹⁸⁵ the Supreme Court commuted the sentence of death finding the confession untrue and noted 'he had no opportunity to have an independent advice'. As in *Bachan Singh Case* Justice Bhagwati held that 'there can be no doubt that the death penalty in its actual operation is discriminatory for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches'.¹⁸⁶

¹⁷⁷ Indian Criminal Procedure Code 1898 section 340(1), Section 304, enables the court of Sessions to assign the pleader for the defense of accused at the expense of state.

¹⁷⁸ Abdul Gafoor Noorani & South Asia Human Rights Documentation Centre, *Challenges to Civil Rights Guarantees in India* (New Delhi: Oxford University Press, 2012), p.129.

¹⁷⁹ Sandeep Kumar Passi, 'Judicial Activism and Legal Aid' in Muzafer Assadi (eds.), *Social Justice, Law and Human Rights* (New Delhi: Serials Publications, 2012), pp.15-21, p.17.

¹⁸⁰ *Sunail Batra v. Dehli Administration* (1978 4SCC 494).

¹⁸¹ *Khatri and Others v. State of Behar and others* AIR1981 SC 928.

¹⁸² *Suk Das v. Union Territory of Arunachal Pradesh* AIR1986 SC 991.

¹⁸³ AIR 1979 SC 1369

¹⁸⁴ *Sukh Dass v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

¹⁸⁵ *Babubhai Udesinh Parmar v. State of Gujrat* (AIR 2007 SC420).

¹⁸⁶ *Bachan Singh, Sher and Anr and Ujagar Singh and Anr. V. State of Punjab* (1982), AIR 1325,1983SCR (1) 145, para.366.

In India, the Code of Criminal Procedure 1898 was amended in 1973¹⁸⁷ and a provision under Section 304 provided to an unrepresented accused at State expenses.¹⁸⁸ In the light of recommendations of the 14th Report of the Law Commission¹⁸⁹, India accorded constitutional sanctity to free legal aid in 1976 by incorporating Article 39-A that obligates the state to provide free legal aid by a suitable legislation.¹⁹⁰ To materialize the objective, the Expert Committee for Legal Aid made its recommendation for the establishment of a legal aid system for the weaker sections of the society.¹⁹¹ Moreover, in 1977 the Committee on Judicature, chaired by Mr. Justice P.N. Bhagwati proposed organizational set up for free legal aid.¹⁹² Against this backdrop, the Legal Services Authorities Act 1987 was passed that envisaged the establishment of Legal Service Authorities at the National, State and District levels along with Legal Services Committees at the Supreme Court, High Court and the Taluka levels.¹⁹³ This Act was not enforced by the Government until November 1995. Amnesty International conducted a study of Supreme Court judgments in death penalty cases from 1950 to 2006 which revealed that effectiveness of legal aid was limited.¹⁹⁴ To ensure free and competent legal services, in 2010, the Indian Government promulgated the regulations that are applicable to the Legal Service Committees of the Supreme Court, High Courts, the Districts and Talukas.¹⁹⁵ The Regulations empower legal services authorities to specially engage experienced and competent lawyers for the indigent accused in the matters where life and liberty are at risk.¹⁹⁶

The Regulations are a good indicator of measures adopted to strengthen the system of legal aid in India. But the two major challenges hamper to trickle down the fruit of the legal aid system to the poor facing the charges of capital offences. Firstly the fee for

¹⁸⁷ Roma Mukherjee, *Women, Law and Free Legal Aid in India* (New Delhi: Deep and Deep Publications, 1998), p.34.

¹⁸⁸ The Code of Criminal Procedure 1973, sec.304.

¹⁸⁹ Indian Law Commission Report, *Reforms of Judicial Administration vol. (1)* (Law Com No. 14, 1958), p.595.

¹⁹⁰ The Constitution of India, article 39-A.

¹⁹¹ Government of India, Report of the Expert Committee on Legal Aid: Procedural Justice to the people (New Delhi, Ministry of Law, Justice and Company Affairs, 1973), p.1

¹⁹² Report on National Judicature Equal Justice-Social Justice, August 31, 1977, para. 3.02.

¹⁹³ National Legal Services Authority Act, 1987, article 3&3A.

¹⁹⁴ Amnesty International India & People's Union for Civil Liberties, *Lethal Lottery: The Death Penalty in India part II* (London: Amnesty International, 2008), para.7.1.1.

¹⁹⁵ National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, Regulation 1(2).

¹⁹⁶ Ibid, Regulation 1(15).

the state's appointed lawyer is not enough to attract the services of competent and experienced lawyers as this has been endorsed by the report based upon the study of Legal Services Authorities of eight states.¹⁹⁷ Under Regulation 8 of NALSA (Free and Competent Legal Aid) the amount stipulated payable per month to lawyers who are called Retainer Lawyers or solely committed to the cause of fighting legal aid cases is a mere sum Rs.5000 (52 pound sterling) per month for district legal service; Rs.7500 (78 pound sterling) per month for High Court Legal services; Rs.10000 (104 pound sterling) per month for Supreme Court Services.¹⁹⁸ Without taking into account the element of corruption, the fees allocated for the legal aid programme are not attractive enough to hire the services of a competent lawyers.¹⁹⁹

Another challenge to free legal aid in India is the mounting arrears of cases and lesser number of lawyers appointed by the state for legal assistance. According to a recent report, 'the Indian criminal justice system is plagued with the ever increasing number of 31.3 million pending cases in different courts of country at all levels'.²⁰⁰ Despite the efforts of the Indian Government 'backlog of cases is mounting every year'.²⁰¹ The question is how many cases a trial judge can handle properly before his fatigue reaches the level which may affect the fairness of the trial.²⁰² It means those who cannot engage lawyers cannot get due attention of judge and the lawyer. According to the Regulations, the strength of Retainer lawyers shall not exceed: (a) 20 in the Supreme Court Legal Services Committee; (b) 15 in the High Court Legal Services Committee; (c) 10 in the District Legal Authority; (d) 5 in the Taluk Legal Services Committee.²⁰³ Obviously the number of lawyers is not in proportion to the number of indigent accused facing various charges. The onus is on the Government of India to respect the right of the accused to be defended by a competent and qualified legal

¹⁹⁷ Ministry of Justice India & UNDP, *Needs Assessment Study of Selected Legal Services Authorities* (New Delhi: MARG, 2012), p.125.

¹⁹⁸ The National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, Regulation 8.

¹⁹⁹ Mittal, Raman, and K.V. Sreemithun, *Legal Aid: Catalyst for Social Change* (New Delhi: Satyam Law International, 2012) p.56-57.

²⁰⁰ HT Data Bureau, 'Justice has a Mountain to Climb of 31.3 Million Pending Cases' Hindustan Times (New Delhi, September 04, 2014) < <http://www.hindustantimes.com/india-news/justice-has-a-mountain-to-climb-of-31-3-million-pending-ca> > accessed on December 30, 2015.

²⁰¹ Vikas H. Gandhi, *Judicial Approach in Criminal Justice System: An Experience of India* (New Delhi: Readworthy, 2010), p.155.

²⁰² K. L. Bhatia, 'Fair Trial in Criminal Proceedings in India' in David Weissbrodt & Rudiger Wolfrum (eds.) *The Right to a Fair Trial* (Berlin: Springer, 1998), pp-373-401, p.401

²⁰³ Regulation 9 of NALSA (Free and Competent Legal Aid, 2010).

practitioner of his or her choice especially when many people in the country cannot afford a lawyer.²⁰⁴

In Pakistan, the free legal aid for the weaker segment of society is an even more neglected area. The Constitution of Pakistan requires the State to provide ‘inexpensive and expeditious justice’.²⁰⁵ ‘Equity before law’ and ‘equal protection of law’ is another fundamental right guaranteed by Article 25 of the Constitution of Pakistan.²⁰⁶ The Code of Criminal Procedure under Section 340 also gives a right to the accused ‘to be defended by a pleader’.²⁰⁷ The High Court Rules also provide for legal assistance at the State’s expense for an accused person charged with a capital offence.²⁰⁸

Despite the constitutional bindings and provisions under the Code of Criminal Procedure of the country, there is no comprehensive system for legal aid to be provided to the indigent persons facing criminal and civil proceedings. The laws and rules governing the legal aid system are scattered and not administered by a single body. For instance, each High Court extends free legal aid to needy persons under the Destitute Litigant Fund Rules 1974 in constitutional matters to destitute litigants. The Deputy Registrar High Court is empowered to decide the eligibility of the recipient of free legal aid under this scheme.²⁰⁹ The High Court Rules authorize the court to engage the legal counsel at the state’s expense for unrepresented accused facing the death penalty or life imprisonment.²¹⁰ Under the rules, the government appointed legal counsel (pauper council) is entitled to get meager amount Rs. 200. per hearing²¹¹(approx. 3 pounds)

The Pakistan Bar Council provides legal aid through its committees working at the Central, Provincial and District levels.²¹² In 1999, the Pakistan Bar Council notified the Free Legal Aid Committee Rules, 99 by exercising the provision under the Legal

²⁰⁴ South Asian Human Rights Documentation Centre, *Handbook of Human Rights and Criminal Justice in India: The System and Procedure* (Oxford: Oxford University Press, 2007), p.113.

²⁰⁵ Constitution of Pakistan, 1973, article 37(d).

²⁰⁶ Ibid, art 37(d).

²⁰⁷ Code of criminal Procedure, sec. 340.

²⁰⁸ Rules and Order of Lahore High Court Lahore, Vol.5, Ch. 4, Part(E), Rule 1.

²⁰⁹ Destitute Litigant Fund Rules 1974.

²¹⁰ Rules and Order of Lahore High Court Lahore, Ch. 4, Part(E), Rule 2.

²¹¹ Ibid, Rule 5.

²¹² Pakistan Bar Council Free Legal Aid Rules,1999, Rule 4.

Practitioner and Bar Council Act, 1973.²¹³ Each legal aid Committee maintains two lists of lawyers' panels: Lawyers who offer services on pro bono basis²¹⁴ and those who offer services on low bono basis.²¹⁵ The Free Legal Aid Committee Rules 1999, require each member of the Pakistan Bar Council and the Provincial Bar Council to conduct at least one case each year assigned to the member by the legal aid committee.²¹⁶

Another system of free legal aid is that of District Legal Empowerment Committees that are established and administered by the Law and Justice Commission of Pakistan.²¹⁷ These committees are chaired by District and Sessions Judges of the respective district in the country.²¹⁸ The committee determines the fees of the legal counsel in accordance with the nature of the case and 'it shall not be more than Rs.20000 in any circumstances for a case'.²¹⁹

In 2009, the Government of Pakistan promulgated the Public Defender and Legal Aid Office Ordinance, 2009, which aims to 'promote justice throughout Pakistan by providing quality and free legal services, protecting individual rights, and advocating for effective defender services and a fair justice system'.²²⁰ Under the ordinance 'any court may direct the Chief Public Defender, an Additional Chief Public Defender, a District Public Defender, or a Public Defender to represent any person including the indigent person in court for whom the court considers, on any ground that such person should be represented by such officer'.²²¹ It was a serious effort to streamline the issue of legal aid in Pakistan. At the time of writing the chapter, the Ordinance has yet to be implemented, and no appointments have been made to any of the newly created positions. Similarly, the Punjab Public Defender Service Act, 2007, a provincial equivalent to the PDLAOA, has yet to be implemented.

²¹³ The Legal Practitioner and Bar Council Act, 1973.

²¹⁴ Pakistan Bar Council Free Legal Aid Rules, 1999, Rule 8(d)i

²¹⁵ Ibid, Rule 8(d)ii.

²¹⁶ Ibid, Rule 8(f).

²¹⁷ Law and Justice Commission of Pakistan in exercise of powers conferred by Sub-section (1) of Section 9 of the Law & Justice Commission of Pakistan Ordinance (XIV of 1979) vide its notification no. S.R.O 684(I)/2011

²¹⁸ District Legal Empowerment Committees Rules (Constitutions and Functions) 2011, Rule 4

²¹⁹ Ibid, Rule 8(iii).

²²⁰ Public Defender and Legal Aid Office Act (PDLAOA), 2009, Preamble.

²²¹ Ibid, section 4(7).

One of the reasons of inadequate legal aid in Pakistan is that the state appointed counsel are poorly paid. In 2007, the International Federation for Human Rights and the Human Rights Commission conducted the interviews of various attorneys estimated that ‘as an average fee for an appeal to High Court in a murder case is approximately Rs 60000 (about £400) and appeal in Supreme Court Rs.300000 (about 1980 pound sterling) a strict minimum.’²²²

Secondly, after analyzing the laws and rules dealing with legal aid in Pakistan it may be discerned that the rules lack sufficient details and guidance on the criteria and methods for the selection of cases and screening of deserving litigants the criterion to assess the eligibility based upon discretion. Further, the sources of funding are not determined which is of paramount importance for a sustainable legal aid system. The National Judicial Policy 2012 underlines the problem and suggests that ‘the Federal and Provincial Government may allocate sufficient fund for the Pakistan Bar Council for activation of the legal Aid Committee’.²²³

Thirdly, there is a lack of clear operating procedures, proper monitoring, reporting and evaluation mechanism, which make it impossible to assess the scale and quality of the legal aid services provided to people. On the basis of the Lahore District Courts Survey (2010-11), Osama Siddique derives the conclusion: ‘Almost no one has ever heard of a free legal aid scheme for vulnerable or disadvantaged litigants, let alone accessed it’.²²⁴ Further, he describes the miserable and pathetic condition of legal aid in these words: ‘more limited choices and contacts for selecting legal counsel Pakistan’.²²⁵

The Constitution of Bangladesh ensures equal protection of the law²²⁶ and guarantees speedy and fair trial²²⁷ but contains no explicit provision that directly binds the Government to provide free legal aid. In recognition of the legal aid as a right, the Government enacted the Legal Service Act 2000. The Act was an initial step to

²²² Human Rights Commission of Pakistan, *A Slow March to Gallows: Death penalty in Pakistan* (2007), p.54.

²²³ National Judicial (Policy Making) Committee, *National Judicial Policy 2009(Revised in 2012)* (Islamabad: Law Justice Commission of Pakistan, 2012), page.25.

²²⁴ Osama Siddique, *Experience with Formal Law: An Alien Justice* (New York: Cambridge University Press, 2013), p.176.

²²⁵ Ibid, p.177.

²²⁶ Constitution of The People’s Republic of Bangladesh, art. 27.

²²⁷ Ibid, art. 35(3).

empower disadvantaged and vulnerable people but it is full of weaknesses, loopholes and procedural complexities.²²⁸ The Act does not spell out the procedure for the selection of the needy applicant and financial resources of the District Legal Aid Committee solely responsible to provide legal aids at grass roots level.²²⁹ Justice Mahmudur Rahman writes: ‘In Bangladesh many cases remain midway because the applicant is unable to afford the legal counsel’.²³⁰ A report of the United Nations Development Programme reveals the fact that the lack of legal representation renders the judicial system ‘virtually inaccessible to the vast majority of the poor and the disadvantaged’.²³¹ Bangladesh expressed its position on public defender in its reservations to the ICCPR that they aspired to fully implement the statutory right to a public defender but currently they lack the financial wherewithal to ensure that right is guaranteed.²³² The provision of legal aid to the needy at the state expense in consonance with international guideline remains a distant goal in Bangladesh.²³³

4.3 Issues Related to Witnesses

Article 14(3) (e) of the International Covenant on Civil and Political Rights requires: ‘To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’.²³⁴ The right of the accused to obtain the attendance and examination of witnesses on his or her behalf is subject to the restriction that this be ‘under the same conditions as witnesses against him (dans les memes conditions que les temoins a charge’.²³⁵ In its General Comment the Committee explained that this provision was ‘designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any

²²⁸ Mohammad Hasan Murad & Md Sarowar Hossain, ‘Legal Aid in Bangladesh: An Overview’ (2014) 4(3) *Journal of Educational and Social Research*, pp. 279-282, p.280.

²²⁹ Md Nannu Mian & Mamunur Rashid, A Critical Analysis of Legal Aid in Bangladesh, (2014) 2(1) *International Journal of Social Research*, pp. 139-150, p.146.

²³⁰ Justice A.M Mahmudur Rahman, ‘Domestic Application of International Human Rights Norms and Access to Justice: The Bangladesh Experience’ in Commonwealth Secretariat (eds.), *Developing Human Rights Jurisprudence Volume 8: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms* (London: INTERIGHTS & Commonwealth Secretariat, 2001), p.60.

²³¹ Charlotte Duncan, Cathy Stevulak and Binoy K. Khisha, *Human Security in Bangladesh: In Search of Justice and Dignity* (Dhaka: United Nations Development Programme, 2002), pp. 34, 42, 47.

²³² Status, Declarations, and Reservations, ICCPR, 999 U.N.T.S. 171, Dec. 16, 1966.

²³³ Justice A.M Mahmudur Rahman (n 230), p.61.

²³⁴ International Covenant on Civil and Political Rights, art 14(3) d.

²³⁵ Manfred Nowak (n 165), p.341.

witnesses as are available to the prosecution’.²³⁶ The Committee observed in *Grant v. Jamaica* case where the failure of a witness to appear in court is attributed to the State’s authorities, the proceeding will be in violation of Article 14, paragraph 1 and 3(e) of the Covenant.²³⁷

In the trial system in India, Pakistan and Bangladesh, the burden of proof lies on the prosecution²³⁸ to prove the guilt of the accused. The prosecution and defense prepare their respective cases and the prosecution has to first lead evidence.²³⁹ The defense cross-examines²⁴⁰ the prosecution witness to test the veracity of the prosecution case. The entire merit of the case is based upon witnesses. Jeremy Bentham highlighted the importance of witnesses in these words: ‘witnesses are the eyes and ears of justice’.²⁴¹ In *Zahira Habibulla. Sheikh and Anr. v. State of Gujara*, the Indian Supreme Court observed ‘If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial’.²⁴² In criminal proceeding there may be persons involved who do not hesitate to commit or contract others to commit violent crimes to stop or influence witness. It is therefore necessary to ensure that witnesses appear in court and give correct and truthful statements. On the other hand, any measure undertaken to increase the security and comfort of witnesses has to be balanced against the rights of the defense and the obligation to respect the principles of due process.

The main issues related to witnesses in the three countries include unreliable witnesses, refusing to appear due to fear of reprisal and witnesses turning hostile under threats, intimidation or any inducement. These issues not only cause undue delay in trial but enhance the probability of powerful escaping from prosecution. Firstly, the problem of unwilling witnesses may be traced back during the period of colonial India. Joseph Chailley depicted the untrustworthy character of witnesses in

²³⁶ UNCHR ‘General Comment No.13’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (1994) UN Doc HRI/GEN/1/Rev.1 at 14 (1994), para 12.

²³⁷ *Lloyd Grant (represented by counsel) v. Jamaica* (Communication No. 353/1988) (4 April 1994) UN Doc. CCPR/C/50/D/353/1988, para.8.4.

²³⁸ Indian Evidence Act 1872, Article 101.

²³⁹ Code of Criminal Procedure 1898, sec.

²⁴⁰ Indian Evidence Act, 1872, Article 137, Article 138, The Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 lay down a comprehensive legal frame work for recoding the

²⁴¹ Jeremy Bentham, *A Treatise on Judicial Evidence from the Manuscripts of Jeremy Bentham*, Esq (1st edn, Baldwin, 1825), p.226.

²⁴² *Zahira Habibulla Sheikh and Anr. v. State of Gujarat*, (2006) Criminal Appeal No-446-449 of 2004, p. 14.

these words: ‘Witnesses, again are less accurate observers, less truthful, and more timid than in Europe. It would be no exaggeration to say that a judge, and especially a criminal judge, rarely finds, in the course of a case, a man whose testimony he can rely and of whom he can say, here is the person who is telling truth’.²⁴³ To illustrate the credibility of dispositions Chailley quoted some examples which he picked up during his visits to Indian Courts ranging from high court to magisterial courts. In 1914, an English judge gave the following remarks regarding witnesses in India:

.... in England it had been reasonable to assume that the individual citizen was willing to help the state, willing to give information of crime brought to his knowledge, willing to give evidence in court against the accused. This assumption was grotesquely untrue in India, where the only willing witness was the false witness or the personally interested one.²⁴⁴

After a century, in March 2003, the findings of the committee on the Reforms of Criminal Justice System, chaired by Dr. Justice V.S. Malimath are not different from the observation of Mr. Chailley. The report says: ‘Witnesses come to the court, take oath and quite often give false evidence with impunity. The procedure for taking action for perjury is not simple and the judges seldom make use of them’.²⁴⁵

Secondly, witnesses are unwilling to appear in court. This problem involves the physical and moral vulnerability of the witness which calls for physical protection of the witness at all stages of the criminal justice process till the conclusiveness of the case. The Indian Law Commission in its 154th Report captured the precarious plight of witness in the criminal justice system in these words: ‘A poor witness is caught between the devil and deep sea. If it fails to attend the court he shall be penally liable and if he attends, he undergoes an agonizing experience resulting in great inconvenience and loss’.²⁴⁶ The witnesses not only get threats but in many cases they have been killed. The Indian Law Commission reveals the horrible fact in these words: ‘The impunity with which persons facing charges of mass murders, rape and gruesome killing are able to frustrate the justice process through the tactics of intimidation, threats and even elimination of witness has given cause for grave

²⁴³ Joseph Chailley (n 71), p.430.

²⁴⁴ East India Police, *Corresponding Relating to Confession of Persons Accused of Criminal Offences*, cmd 7234(1914), para.22.

²⁴⁵ Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System, (March 2003), para.1.37.

²⁴⁶ Law Commission of India, *Report on the Code of Criminal Procedure 1973* (Law Com No. 154, 1996), Chapter X, para.4.

concern’.²⁴⁷ Justice Wadhwa in *Swaran Singh vs. State of Punjab* observed: ‘Here the witnesses who are harassed a lot (...) not only that witness is threatened; he is abducted; he is maimed; he is done away with or even bribed. There is no protection for him’.²⁴⁸ The Bangladesh Law Commission Report No. 74 states: ‘The witnesses are reluctant to come before a court or tribunal to give their evidence in the case for fear of their own life and property or those of families’.²⁴⁹ The Pakistan Law Commission commented that ‘they may not be unnecessary called and be ensured protection of their lives’.²⁵⁰

In Pakistan, no one is willing to testify against powerful criminals and militants in courts because killing witnesses has become an easy and effective method of stymieing justice in many cases. A notorious example is that of terrorist Malik Ishaq²⁵¹ who was charged with at least seventy murders but was never convicted because no one wanted to put his or her life in danger by being a witness against him.²⁵² There are numerous reported cases where witnesses have been killed by the family or friends of powerful accused and accomplices of terrorists. The five witnesses of Wali Khan Babar’s murder case including Rajab Bangali, Asif Rafiq, Naveed Tanoli brother of Inspector Shafiq Tanoli who arrested the accused and Haider Ali who identified the accused and one prosecutor Naimat Randhawa were all killed despite the direction of the Sindh High Court under the Anti-Terrorist Act of 1997.²⁵³ The key witness of Sabeen Mahmood’s Murder²⁵⁴ case namely Ghulam Abass was killed on September 7, 2015.²⁵⁵

The third problem is that of the witness turning hostile under intimidation or allurements. In the best interest of justice, it is vital to preserve the evidence that has already been collected at the stage of investigation by not allowing witnesses

²⁴⁷ Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (New Delhi: Ministry of Justice, 2004), p.15.

²⁴⁸ *Swaran Singh vs. State of Punjab*, AIR2000 SC 2017.

²⁴⁹ Bangladesh Law Commission, *A Final Report on a Proposed law relating to Protection of Victims and witnesses of Crime Involving Grave Offences* (Law Com No.74, 2006), p.3.

²⁵⁰ Pakistan Law Commission, *Expediting Trial Proceedings* (Law Com No. 60, 2003), p.7.

²⁵¹ Hailing from Sipah-e-Sahaba, a sectarian organization.

²⁵² Hassan Abbas, *Reforming Pakistan’s Police and Law Enforcement Infrastructure: Is too Flawed to Fix* (Washington DC: United State Institute of Peace, 2011), p.12.

²⁵³ The Anti -Terrorism Act 1997, section 21(1).

²⁵⁴ Sbeen Mahmood, Human Rights Activist and founder of social forum The Second Floor(T2F), was killed in April, 2015.

²⁵⁵ Imtiaz Ali, ‘Key Witness in Sabeen Mahmud Murder Case Shot Dead in Karachi’ Karachi (The Dawn, September 07, 2015).

retracting from their statements.²⁵⁶ The Bangladesh Law Commission reports that ‘in most of the cases involving rich and influential persons, witnesses turn hostile making the whole process of justice infructuous’.²⁵⁷ In India, there are numerous examples when the prosecution case has fallen apart due to witnesses turning hostile. Some highly publicized examples of witnesses turning hostile include the murder case of model Jessica Lal, in which eyewitness Shyan Munshi back tracked from his police statement because Siddharth Vashisht, also known as Manu Sharma, the son of Venod Sharma, a wealthy and influential Congress-nominated Member of Parliament from Haryana, as the murderer²⁵⁸. In BMW case, Sanjeev, son of an Indian Industrialist ran over six people including three police officers. Prosecution witness Manoj Malik retracted his statement and described the vehicle involved in the accident as a truck instead of a car.²⁵⁹ Subsequently, the Delhi High Court, the appellate court, made the observation: ‘The power of money had adopted dubious methods to win over witnesses, police and prosecutors’.²⁶⁰ In the trial of the Best Bakery case (burning 14 persons alive in 2002), Zaheera Sheikh, whose family members were burnt to death, and other witnesses retracted their statements under intimidation.²⁶¹ As a result all accused were acquitted by Vadodara fast track trial court due to lack of evidence.²⁶² Gujarat High Court in its judgment *State Of Gujarat vs Rajubhai Dhamirbhai Bariya*, on 26 December, 2003, refused to review the trial court order but the Supreme Court ordered for retrial.²⁶³ The Supreme Court observed: ‘If the witnesses get threatened or are forced to give false evidence that also

²⁵⁶ Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (New Delhi: Ministry of Justice, 2004), p.15.

²⁵⁷ Bangladesh Law Commission, *A Final Report on a Proposed law relating to Protection of Victims and Witnesses of Crime Involving Grave Offences* (Law Com No.74, 2006), p.4.

²⁵⁸ Jessica Lal Murder Case: Chronology of Events (The Hindu, August 9, 2014) <http://www.thehindu.com/news/national/jessica-lal-murder-case-chronology-of-events/article403202.ece> accessed on 30 December, 2015.

²⁵⁹ BMW Case: Extraneous reasons behind witness turning hostile (July 4, 2008) http://zeenews.india.com/news/nation/bmw-case-extraneous-reasons-behind-witness-turning-hostile_453198.htm accessed on December 30, 2015.

²⁶⁰ Sanjeev Nanda Versus the State [2008] The High court of Delhi at new Delhi, CrI. 807/2008, para 357, p.257.

²⁶¹ Rajeev Dhavan, ‘Justice, Justice and the Best Bakery Case’ (2003) 30(2) *India International Centre Quarterly*, pp. 1–11, p.1.

²⁶² Rajeev Dhavan ‘Justice, Justice and the Best Bakery Case’ (2003) 30(2) *India International Centre Quarterly*, pp. 1–11, p.5.

²⁶³ *Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors* [2004] Criminal Appeal No-446-449 of 2004.

would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial’.²⁶⁴

In Pakistan, on October 30, 2015 the Chief Justice of Pakistan took suo moto notice on the acquittal of five accused persons including the son of a former Federal Minister charged with the murder of a 16 years old orphan by the trial court. The Anti-Terrorism Court (ATC) in Lahore exonerated the accused on the ground that there was no possibility of conviction due to lack of evidence²⁶⁵ because the prosecution witnesses turned hostile. The mother of the deceased, Mst. Ghazala recorded the statement in the Supreme Court that ‘she is too weak to fight against the killers of her deceased son, as the accused party is very powerful’.²⁶⁶ The three member bench of the Supreme Court of Pakistan commented in their order: ‘We in the given circumstances are shocked to see the state of affairs where a mother of a young boy because of her weaknesses and other shortcomings is being compelled to give up her right to seek justice. The procedure provided under our present criminal justice system is very cumbersome’.²⁶⁷

India, Pakistan and Bangladesh has no comprehensive legislation to guarantee the protection of witnesses.²⁶⁸ Only a limited protection exist in the form of sections 151 and 152 of the Indian Evidence Act, 1872 which safeguard witnesses against harassment during examination or cross examination in court.²⁶⁹ In the perspective of India, both Law Commissions and the Supreme Court of India have underlined the need for law on various aspects of witness protection. The 154th Report of the Indian Law Commission 1996 contains a chapter on ‘Protection and Facilities to Witnesses’.²⁷⁰ One of the recommendations of the Commission was: ‘witnesses should be provided sufficient protection’²⁷¹ but the Commission does not suggest any measures for the physical protection of witnesses. The urgent need to introduce

²⁶⁴ Ibid, p.16.

²⁶⁵ The Code of Criminal Procedure 1898, 249-A.

²⁶⁶ Supreme Court of Pakistan, Suo Moto Case No. 15 of 2015 dated November 19,2015, para 1 Suo Moto action regarding acquittal of Mustafa Kanju S/o Siddique Kanju (Former State Minister) and his four Security Guards due to lack of evidence.

²⁶⁷ Supreme Court of Pakistan, Suo Moto Case No. 15 of 2015, November 19,2015, para 3.

²⁶⁸ South Asian Human Rights Documentation Centre, *Human Rights and Humanitarian Law: Development in Indian and International Law* (New Delhi: Oxford University Press, 2008), 341.

²⁶⁹ Indian Evidence Act 1872, sections 151 &152.

²⁷⁰ Law Commission of India, *Report on the Code of Criminal Procedure 1973* (Law Com No.154, 1996), Chapter X.

²⁷¹ Ibid, Chapter X.

protection measures is evident from the observation made by the Supreme Court in *National Human Rights Commission v. State of Gujrat*.²⁷² The Supreme Court of India placed emphasis on the need to secure the safety of witnesses as it is a means to ensure a successful prosecution.²⁷³ In *Neelam Katara v. Union of India*²⁷⁴ the Delhi High Court laid down the guidelines with respect to witness protection. In *Zahaira Habibullah. Sheikh & Others v. State of Gujrat and others*, the Supreme Court legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day.²⁷⁵ The Malmaith Committee identifies this big flaw that ‘there is no law to protect the witnesses’.²⁷⁶ The 178th Report of the Law Commission referred to the fact of witness turning hostile, and the recommendations were only to prevent witnesses from turning hostile. The Report suggested an amendment to insert Section.164 A to the Code of Criminal Procedure.²⁷⁷ The Criminal Law Amendment Act 2005, has inserted section 195A into the Indian Penal Code, which criminalizes the act of ‘threatening or inducing any person to give false evidence’ with imprisonment up to seven years or fine or both.

To address the issue of the protection of witnesses in Pakistan the Federal Government included a provision in ‘the Protection of Pakistan Act 2014’ reiterating that ‘the Government shall take appropriate measures to provide adequate security to the prosecution witness’.²⁷⁸ The Sindh Witness Protection Act, 2013, envisaged to ‘encourage the witnesses to give evidence by providing protection to them and their families’.²⁷⁹ The programme spells out relocation, false identity and other necessary security measures.²⁸⁰ But the law could not be materialized because of a ‘lack of adequate resources’.²⁸¹

²⁷² 2003 (9) SCALE 329.

²⁷³ 2003(9) SCALE 329.

²⁷⁴ *Neelam Katara v. Union of India* [2003] (Crl.W.No.247 of 2002), p.4.

²⁷⁵ *Zahaira Habibullah H. Sheikh & Others v. State of Gujrate*, 4SCALE 375, p.395.

²⁷⁶ Government of India, Committee on Reforms of Criminal Justice System (Bangalore: Ministry of Home affairs, 2003), para.1.37.

²⁷⁷ Law Commission of India, *Recommendations for Amending Various Enactments, Both Civil and Criminal* (Law Com No.178, 2001), page 116.

²⁷⁸ Protection of Pakistan Act, 2014, sec 13.

²⁷⁹ The Sindh Witness Protection 2013, Statement of Objects and Reasons.

²⁸⁰ The Sindh Witness Protection 2013, section 24.

²⁸¹ Tariq Parvez & Mehwish Rani, *An Appraisal of Pakistan’s Anti-Terrorism Act* (Washington D. C., United States Institute of Peace, 2015), p.7.

It is pertinent to mention that anti-terrorism legislation in these countries have had provisions for the protection of witnesses. In India, the draconian laws like the Terrorist and Disruptive Activities (Prevention) Act, 1987, and the Prevention of Terrorism Act, 2002, provided for protection of witnesses. In Pakistan, the Anti-Terrorism Act, 1997 provides protection for witnesses, prosecutors and judges.²⁸² The recently promulgated Protection of Pakistan Act also only mentions the responsibility of the Government to protect witnesses.²⁸³ Witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes. The protection clause for witnesses under special anti-terror legislation²⁸⁴ only applies to prosecution witnesses and not to a defense witness, who also faces the threat of intimidation and harassment from the police and may be afraid to depose before the court.²⁸⁵ This is a glaring omission in witness protection that severely prejudices the ability to mount a credible defense.

Conclusion

A life taken under state apparatus/judiciary is an arbitrary deprivation of life if the standards of collection of evidence against the accused and fair trial as enunciated under Articles 9, 14, 15 and 16 of the International Covenant on Civil and Political Rights (ICCPR) are not met. In this context, the United Nations Human Rights Committee has consistently held that if Article 14 of ICCPR is violated during the trial then Article 6 of the ICCPR is also breached. The reports of different UN Special Rapporteurs also reiterate the interpretation of the Human Rights Committee. In this series, the first report of UN Special *Rapporteur* on Summary or Arbitrary Executions says: ‘where a government has imposed a death penalty but failed to comply with the procedural safeguards presented in international law, it has violated international law and has arbitrarily deprived a person of his life’.²⁸⁶ In fact, the potential for wrongful conviction and possibility for the execution of the innocent or those who have not had a fair trial is the *raison d’etre* for exacting standards and a heightened level of due process in capital cases.

²⁸² The Anti-Terrorism Act(ATA),1997,2002, sec.21.

²⁸³ The Protection of Pakistan Act, 2014, sec.12.

²⁸⁴ Terrorist and Disruptive Activities (Prevention) Act, 1987, sec.16.

²⁸⁵ Prevention of Terrorism Act, 2002, sec.30(2).

²⁸⁶ UNCHR ‘*Report by Special Rapporteur on Summary or Arbitrary Executions*’ (1983) UN Doc. E/CN.4/1983/16, para 55.

To evaluate the fairness of criminal proceedings in India, Pakistan and Bangladesh, this study has referred to the human rights treaties which have been ratified by these countries, norms of customary international law, the guarantees and protections provided in the domestic constitution and the penal laws of these countries. Judged by the said standards, the criminal proceedings do not conform to protections provided by international and the national laws to suspects and defendants in capital cases in the following areas: The collection of clear and convincing evidence, legal aid at state's expense and protection of witnesses.

At the pre-trial stage, the first gross violation to the safe guards for those facing capital punishment is that the investigating agencies employ torture to extract confession. The torture by police inflicted on the suspect has been a reality in all major phases of history from the Vedic Age to British Rule in the Indian subcontinent. This past refuses to go away and torture still prevails as a public secret. The indiscriminate use of torture based on the wrong assessment of suspects, behavior by investigating officers have been condemned by the judiciary, law commissions and police commissions hitherto appointed by different governments in different periods of time. The High Courts and the Supreme Courts of India, Pakistan and Bangladesh in variety of judgments have made the observations that police may not physically or psychologically intimidate suspects during custody and interrogation. Simultaneously, both international and national human rights organizations, and the UN Human Rights Council in its universal periodic reviews of these countries criticize the torture employed by the investigating agencies during the course of investigation.

The investigating agencies including police employ torture as a major tool for investigation because they are poorly equipped,²⁸⁷ poorly trained to preserve crime scene and collection of evidence.²⁸⁸ Owing to a lack of forensic support and the proper training of staff, torture is considered as a cheap and effective means to secure a confession. At the same time, judicious use of custodial torture is seen both as a necessity and justification for police operation. It is not only glaring violation of safeguard 'to impose death penalty only when the guilt of the person charged is based upon clear and convincing evidence' but also multiplies the risk of prosecuting the

²⁸⁷ Brig (R) Muhammad Yasin, *District and Police Systems in Pakistan* (Islamabad: Vanguard, 1999), p.167.

²⁸⁸ J. C. Chaturvedi, *Police Administration and Investigation of Crime* (Delhi: Isha Books, 2006), p.85.

innocent. It is pertinent to mention that despite these south Asian countries being States parties to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) none of them have defined and criminalized torture in their domestic law.

Despite international, domestic constitutional and statutory obligations on the provision of effective legal aid in capital cases during all stages of a capital trial, the three states have failed to establish a mechanism to provide effective legal aid. It is imperative to respect the right of the accused to be defended by a competent and qualified legal practitioner of his or her choice especially when many people in these countries cannot afford to engage legal counsel for their defense. To fulfill the constitutional obligations under article 39-A, the Indian Government introduced the Legal Services Authorities Act 1987 that was not enforced by the Government until November 1995. To ensure free and competent legal services, in 2010, the Indian Government promulgated the regulations. But two major challenges hamper to trickle down the fruit of legal aid system to the poor facing the charges of capital offences. Firstly, the fee for the state's appointed lawyer is not enough to attract the services of competent and experienced lawyer. Secondly mounting arrears of cases at all levels of courts frustrate government effort- less number of lawyers appointed by the government for the legal assistance in proportion to the number of cases cannot make any difference.

There is no comprehensive and uniform legal framework for legal aid in Pakistan. The laws and rules governing legal aid are scattered and not administered by a single body. The three different systems of free legal aid work namely under the command of three different entities: the High Court Legal aid system works under High Court Rules (Pauper Council) and Destitute Litigant Fund Rules; the Pakistan Bar Council provides legal aid through its legal aids committees; the Pakistan Law and Justice Commission provides legal aid through its District Legal Empowerment Committees. The three different systems of legal aid are without any other constant and sufficient source of funding except the meager amount allocated by the Government under Article 37(d) of the Constitution. To streamline quality and free legal services, the Government of Pakistan promulgated the Public Defender and Legal Aid Office Ordinance, 2009, which has yet to be implemented.

The Constitution of Bangladesh ensures equal protection of law and guarantees speedy and fair trials but contains no explicit provision that directly binds the Government to provide free legal aid to the indigent. In recognition of the legal aid as a right, the Government enacted the Legal Service Act 2000. The Act was an initial step to empower disadvantaged and vulnerable people but it is full of weaknesses, loopholes and procedural complexities. Consequently, the provision of legal aid to the needy at the state expense in consonance with international guideline remains a distant goal in Bangladesh.

Thirdly, the criminal justice system in India, Pakistan and Bangladesh is unable to facilitate both defense and prosecution witnesses to testify in an atmosphere free of intimidation. The issues related to witnesses namely unreliable witnesses, refusing to appear due to fear of reprisal and witnesses turning hostile under threats, intimidation or any inducement get incapacitate the interest of justice by causing inordinate delay and providing immunity to the powerful from prosecution. One of the major causes of the problem is that no comprehensive legislation on the protection of witness as against threats, intimidation or any inducement whereby they are prevented from telling the truth or turning hostile. Limited protections exist in the form of Sections 151 and 152 of the Indian Evidence Act, 1872, which safeguard witnesses against harassment during examination or cross examination in court.

It is pertinent to mention that special laws enforced to combat terrorism in these countries²⁸⁹ provide protection for witnesses, prosecutors and judges. The protection clause for witness under special anti-terror legislation only applies to prosecution witnesses and not to defense witnesses, who also faces the threat of intimidation and harassment from the police and may be afraid to depose before the court. This is a glaring omission in witness protection that severely prejudices the ability to mount a credible defense.

To conclude, the criminal justice systems in the three South Asian countries focused upon in this study are plagued by an ineffective system of legal aid at the state's expense, investigation based upon torture and confession and no effective law to protect both prosecution and defense witnesses. The presence of the three major flaws

²⁸⁹ India Terrorist and Disruptive Activities (Prevention) Act, 1987; India Prevention of Terrorism Act, 2002; Pakistan Anti- Terrorism Act, 1997 provided for protection of witnesses. Pakistan Anti-Terrorism Act, 1997 and Protection of Pakistan Act 2014.

questions the legitimacy of criminal proceedings in general and, that of fair trial in capital cases, in particular.

Chapter 5

Application of Capital Punishment under Special Laws and Courts to Counter Terrorism in Pakistan, India and Bangladesh

Introduction:

Pakistan¹, India² and Bangladesh³ have constituted special courts under special laws to counter different types of terrorism including religious militancy and separation movements. Without declaring emergency by invoking respective emergency clauses enshrined in domestic constitutions and treaty laws, the governments in these countries claim that they are in situation of war. Both the judiciary and governments in these countries justify the establishment of anti-terrorism courts under special laws on the ground that the war on terrorism requires special laws and procedures to prosecute the terrorists who get easily exonerated under regular criminal justice systems. The special laws empower courts to prosecute individuals for vaguely defined offences related to terrorism and to award sentences of death as a maximum punishment. This chapter explores how special legislation in these three countries have broadened the scope of capital punishment. Moreover, the special courts have heightened the risk of arbitrary and subjective application of capital punishment by adopting special procedures and lowering the fair trial standards.

5.1 International Legal Framework on Counter Terrorism and Special Courts

¹ Anti-terrorism Courts under *Anti-Terrorism Act 1997*, since its enactment the law has been amended seventeen times; The investigation for the Fair Trial Act 2013; *Protection of Pakistan Act 2014*; In 2015, Twenty-first Constitutional Amendment to establish Military Courts for the period of two years.

² The legislative response of India to deal with terrorism include *Terrorist Affected Areas (Special Courts) Act 1984*, the *Terrorism and Disruptive Activities(prevention)Act,1987* (allowed to lapse in 1995, the *Prevention of Terrorism Act 2002*(repealed in 2004), and Unlawful Activities Prevention Act,2002, the Unlawful Activities(prevention) Act 1967(as amended in 2004 and 2008) and National Investigation Agency Act,2008.

³ Bangladesh also introduced special laws namely Anti-Terrorism Act 2009 and Special Power Act 1974 to combat various heinous offences including terrorism.

5.1.1. Global Counter Terrorism Strategy

The international legal framework has been developed, under which states may take special measures to deal with terrorism or any state emergency. Following 9/11, the Security Council, under its power provided by Chapter VII of the United Nations Charter, passed a resolution that obliged the Member States to criminalize terrorists' acts as serious offences.⁴ The Security Council Resolution 1566 called on states to criminalize terrorist acts and punishing terrorists.⁵ Security Council Resolution 1373 required appropriate measures to combat terrorism in conformity with international standards of human rights.⁶ Security Council Resolution 1456(2003) calls on Member States to take measures to combat terrorism that must be consistent with international law on human rights, international law on refugee and humanitarian law.⁷

A series of resolutions on the protection of human rights and fundamental freedoms while countering terrorism has been adopted by the General Assembly, the first dating from December 2002⁸. These resolutions also oblige states to ensure the compatibility of counter terrorism measures with their obligation for human rights. The United Nations Global Counter-Terrorism Strategy 2006,⁹ based upon a report by the UN Secretary General, highlights priority areas namely 'promoting the rule of law, respect for human rights and effective criminal justice systems'.¹⁰ The report condemns terrorists' acts as 'violations of the right to life, liberty, security, well-being and freedom from fear'¹¹ but at the same time it insists that 'we must never sacrifice our values and lower our standards to those of the terrorists'.¹² The report warns that

⁴ UNSC Res S/RES/1373 (28 September 2001), para.2.

⁵ UNSC Res1566(8 October 2004) UN Doc S/RES/1566(2004), para.3.

⁶ UNSC Res1373 (28 September 2001) UN Doc S/RES/1373, para.3(f).

⁷ UNSC Res 1456 (20 January 2003), UN Doc S/RES/ 1456, para.6; Reports of the Counter-terrorism Committee referred to the same requirement UN Doc S/2005/800, para.13; Conclusions for Policy Guidance Regarding human rights and the CTC, UN Doc S/AC.40/2006/PG.2, (25 May 2006).

⁸ UNGA Res 57/219(18 December 2002) UN Doc A/RES/57/219, p,1; the same provision has been incorporated in subsequent resolutions: 58/187, 22 December 2003; 59/191,20 December 2004; 60/158,16 December 2005 and 63/185 18 December 2008; 64/168, 18 December 2009;

⁹ UNGA Res 60/228 and Annex, 8 September 2006.

¹⁰ Report of the UN Secretary General, 'Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy' (2006) UN Doc A/60/825, paras.77-78.

¹¹ Ibid, para.111.

¹² Report of the UN Secretary General, 'Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy' (2006) UN Doc A/60/825, para.112.

the consequence of reducing the conditions ‘may generate cycles of terrorist violence’.¹³

Counter Terrorism/Emergencies and Right to Fair Trial

International human rights instruments ‘do try to envision and legally encompass this state of emergency and confine unlimited use or abuse of governmental power’.¹⁴ In this regard, Article 4 of the International Covenant on Civil and Political Rights allows the states parties to derogate some rights ‘in time of public emergency which threatens a life of nation’.¹⁵ Manfred Nowak comments: ‘Similar to an individual’s right to self-defense under criminal law, a government’s emergency power allows it to take exceptional measures including suspension of basic rights’.¹⁶ In fact, the principle of legality and the rule of law have to govern such public emergency so government to comply with two basic conditions before invoking Article 4(1) of the Covenant. First, the situation must amount to a public emergency which threatens the life of a nation and second the state party must have officially proclaimed a state of emergency.¹⁷ The ICJ confirmed in the Nuclear Weapons Opinions¹⁸ as well as in the Wall Opinion¹⁹ that as long as a State has not validly derogated from a provision, the norms apply irrespective of the existence of an emergency. Moreover, this power of the state is governed by the proportionality principle. A Government may derogate from its legal obligations ‘to the extent strictly required by the exigencies of the situation’.²⁰ Ramraj explains the requirement of strict necessity: ‘States may use such measures as are strictly necessary to deal with the emergency’.²¹

¹³ Report of the UN Secretary General, ‘Uniting against Terrorism: recommendations for a global counter-terrorism strategy’(2006) UN Doc A/60/825,para.113.

¹⁴ Roza Pati, *Due Process and International Terrorism: A International Legal Analysis* (Leiden: Martinus Nijhoff Publishers, 2009), p.19.

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1976, entered into force 23 March 1976) 999 UNTS 171(ICCPR), art.4(1).

¹⁶ Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary 73(1993)

¹⁷ UNCHR ‘General Comment No. 29: Article 4: Derogations During a State of Emergency’ (31 August 2001) Un Doc. CCPR/C/21/Rev.1, para.2.

¹⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, paras.226-267,240

¹⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,134-203, 178 (para.106).

²⁰ International Covenant on Civil and Political Rights (adopted 16 December 1976, entered into force 23 March 1976) 999 UNTS 171(ICCPR), art.4(1)

²¹ Victor V. Ramraj, ‘The Emergency Powers Paradox’ In Victor V. Ramraj & Arun K. Thiruvengadam (eds) *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2010), pp-21-55, p. 51.

Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR) does not enlist the right of fair trial under Article 14 among the category of non-derogable rights.²² It does not imply that States facing an emergency can depart from the right to a fair trial as they see fit.²³ The required minimum level of due process is identified with the help of the principle of consistency.²⁴ The principle requires derogation measures to be consistent with the State's other obligations under international law such as the norms of international humanitarian law, applicable during armed conflict.²⁵ The Human Rights Committee, in its General comments spells out:

Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in Article 4, paragraph 2. States parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.²⁶

In its General Comment 32, on the right to a fair trial the Human Rights Committee affirmed, 'the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as Article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of Article 14.'²⁷

Guarantees of Fair Trial under International Humanitarian Law

²² International Covenant on Civil and Political Rights (adopted 16 December 1976, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art.4(2).

²³ Evelyne Schmid, 'The Right to Fair Trial in times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant and Political Rights' (2009) *Gottingen Journal of International Law* 29, p.31.

²⁴ The principle of consistency is the prohibition of derogation measures "inconsistent with [a State party's] other obligations under international law.

²⁵ Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law' in Martin Scheinin (eds.), *Terrorism and Human Rights* (Cheltenham: An Elgar Research Collection, 2013), pp.3-39, p.29.

²⁶ UNCHR 'General Comment 29', in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para.11.

²⁷ UNCHR 'General Comment No. 32', in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2007) UN Doc. CCPR/C/GC/32, para.59, para.6.

Every human being is entitled to a fair and regular trial whatever the circumstances including in the context of the war on terrorism, an international armed conflict and a non-international armed conflict. States are obliged to observe the minimum standards of due process in international armed conflicts as well as non-international armed conflict under the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. The convergence of the fair trial Articles in the two 1977 Additional Protocols to the Geneva Conventions provide a sound basis for an assessment of the customary minimum standards of a fair trial.²⁸ Article 75 paragraph 4, Protocol I provides the fundamental guarantees in judicial matters that must be respected even during international conflicts, referring to an ‘impartial and regularly constituted court’.²⁹ Broadly speaking, ‘those judicial standards which are common to both Protocols are applicable in both types of armed conflict’.³⁰

The majority of guarantees are included in Article 6 Protocol II Additional to the Geneva Conventions which protects persons prosecuted for offences related to a non-inter-national armed conflict.³¹ Article 6, Protocol II, envisages certain due process protections and a prohibition on juvenile executions, and the execution of pregnant women and mothers of young children.³² The International Committee of the Red Cross commentary on this article says: ‘Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect’.³³ Article 6 supplements and develops Common Article 3, paragraph 1, subparagraph (1)(d) of the four Geneva Conventions which prohibits ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’.³⁴

²⁸ Stephanos Stavros, The Right to a Fair Trial in Emergency Situations’ (1992) 4(2) *International and Comparative Law Quarterly* 343, p

²⁹ Protocol I Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Article 75(4).

³⁰ Evelyne Schmid, The Right to Fair Trial in times of Terrorism: A Method to identify the Non-Derogatable Aspects of Article 14 of the International Covenant and Political Rights, (2009) *Göttingen Journal of International Law* 29, pp.29-44, p.39.

³¹ Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, (1977) 1125 UNTS 609, art.6.

³² Ibid, art.6.

³³ ICRC Commentary on Additional Protocols, 1987, para. 4597.

³⁴ Additional Protocol I (AP I) regulates international armed conflicts and Additional Protocol II (AP II) extends protection to victims of internal conflicts.

The International Court of Justice confirmed in *Nicaragua versus the United State* that Article 3 common to the four Geneva Conventions, constitutes a ‘minimum yard stick’ applicable to all armed conflicts.³⁵ Pro. Schabas explains that Common Article 3, Article 14 of the International Covenant on Civil and Political Rights, the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty and Article 75(4) of Additional Protocol I to the Geneva Conventions provide an indication of what is ‘recognized as indispensable by civilized peoples’.³⁶ He further argues: ‘Humanitarian law provisions define the lowest common denominator of human behavior, a minimum standard below which no civilized society can descend either in wartime or in peace time’.³⁷

5.1.2. Legitimacy of Special Courts/Tribunal

The establishment of a special court must remain an exceptional decision. The independence and impartiality of the special court must be ensured, they must observe minimum fair trial guarantees. The right to a fair trial is set out in Article 10 of the Universal Declaration of Human Rights and Article 14 of ICCPR. Article 14(1) of the International Covenant on Civil and Political Rights says: ‘Every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.³⁸ The Human Rights Committee in its General Comment 32 noted: ‘The requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1, is an absolute right that is not subject to any exception’.³⁹ The Human Rights Committee explains: ‘A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal’.⁴⁰ The Basic Principles on the Independence of the Judiciary, adopted by the UN General Assembly in 1985, stipulated: ‘The independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country’.

³⁵ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986, p.14, para.218.

³⁶ William A. Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge: Cambridge University Press, 2002), p.213.

³⁷ Ibid, p.213.

³⁸ International Covenant on Civil and Political Rights (adopted 16 December 1976, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art.14(1).

³⁹ UNCHR ‘General Comment No. 32, Article 14: Right to Equality before Courts and Tribunales and to a Fair Trial’ (2007) UN Doc. CCPR/C/GC/32, para.19; see Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.

⁴⁰ Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4. HRC para.19.

The trial of civilians by military courts is not strictly prohibited by the International Covenant on Civil and Political Rights. However, the Human Rights Committee underlines that ‘the trials of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned’.⁴¹ That is why the Human Rights Committee has particularly in its views concerning individual communications or its concluding observations on national reports repeatedly called on States Parties to prohibit trials of civilians before military courts.⁴² In 2006, the Economic and Social Council approved the Draft Principles Governing the Administration of Justice through Military Tribunals that affirm the jurisdiction of military courts should be restricted to military personnel in relation to military offences.⁴³ Similarly, Principle 29 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity states that: ‘The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel’.⁴⁴

Regarding procedure, the special or military tribunals must in all circumstances adopt standards and procedures internationally recognized as guarantees of a fair trial, including rules of international humanitarian law. The Human Rights Committee in its General Comment 32 notes: ‘While the Covenant does not prohibit the trial of civilian in military or special courts, it requires that such trials are in full conformity with the requirements of Article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned’.⁴⁵ But in practice, states use special powers of arrest, detention and lower standard of proof to prosecute suspects and political opponents. Roza Pati points out that ‘it was often hard to reconcile such measures with time honored guarantees of due processes’.⁴⁶

⁴¹ UNCHR ‘General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’ (2007) UN Doc. CCPR/C/GC/32, para.22.

⁴² UHRC, Concluding Observations, Slovakia, UN Doc. CCPR/C/79 add.79(1997), para 20; Lebanon, UN Doc CCPR/C/79/add 78(1997), para. 14; Chile, UN Doc CCPR/C/CHL/Co/5(2007) para 12; Tajikistan UN Doc CCPR/Co/84/TJK (2004), para 18.

⁴³ Economic and Social Council ‘Draft Principles Governing the Administration of Justice Through Military Tribunals’ (13 January, 2006) UN Doc. E/CN.4/2006/58, principle 5.

⁴⁴ Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, (8 February, 2005), principle 29.

⁴⁵ UNCHR ‘General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’ (2007) UN Doc. CCPR/C/GC/32, para. 22.

⁴⁶ Roza Pati, *Due Process and International Terrorism: A International Legal Analysis* (Leiden: Martinus Nijhoff Publishers, 2009), p.19.

Experience of special courts in different parts of the world whether they be in Kenya or the Republic of Ireland have meant a diminution in legal standards, a denial of basic human rights and their main function has been to put a legal veneer on killings by the state.⁴⁷ This has led, the Inter-American Court of Human Rights in *Palamara-Iribarne v. Chile* to clarify that under no circumstances should civilians be tried before a military court.⁴⁸ The African Commission on Human and People's Rights in *Law Office of Ghazi Suleiman v. Sudan* declared: 'Civilian appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial'.⁴⁹

Nepal and Sri Lanka faced far more protracted and deadly insurgencies and acts of terrorism but they did not use the death penalty to ensure the national security.⁵⁰ Since 1976, Sri Lanka did not carry out any execution though capital punishment remains in the statute book. The Liberation Tigers of Tamil Eelam (LTTE) perfected the use of suicide bombers, invented the suicide belt and pioneered the use of women in suicide attacks. The (LTTE) assassinated former Prime Minister of India, Rajiv Gandhi on May 21 May 1991, President of Sri Lanka Ranasinghe Premadasa on 1 May 1993,⁵¹ Lakshman Kadirgamar, Sri Lanka's Foreign Minister on 12 August 2005. There were attempts of suicidal attack on then Minister and current President of Sri Lanka Maithripala Sirisena on 9 October 2008.⁵²

Nepal is another South Asian Country that did not use capital punishment to deal with the Communist Party of Nepal-Maoists and the last execution was conducted in 1979. The Communist Party of Nepal-Maoist (CPN-M) in the armed struggle that claimed over 13,000 lives from 1996 to 2006.⁵³

To conclude the international legal framework allows establishment of special or military courts to prosecute terrorists but the courts are the exception but not a rule.

⁴⁷ R. McShane, *Special Courts: A Critique* (Belfast: NICRA, 1972), p.5.

⁴⁸ *Palamara-Iribarne v. Chile*, *Inter-American Court of Human Rights* (22 November 2005) paras-124,139,269(14).

⁴⁹ The African Commission on Human and People's Rights '(228/99) *Law Office of Ghazi Suleiman v. Sudan*' para.64.

⁵⁰ Asian Centre for Human Rights, *India: No Defense for Retention of Death Penalty* (New Delhi: Asian Centre for Human Rights, 2015) p.33.

⁵¹ Suicide Bomber Kills President of Sri Lanka, *New York Times*, 2 May 1993.

⁵² Minister Maithripala Sirisena Escapes Suicide Bomb Attack, Deputy Minister Injured, *The Sunday Times*, 9 October, 2008.

⁵³ The United Nations Office of the High Commissioner for Human Rights, *Nepal Conflict Report* (Geneva: 2012), p. 14.

UN Security Council resolutions allow members states to take special measures to counter terrorism but these steps must be in conformity with international human rights law, international refugee law and international humanitarian law. The International Covenant on Civil and Political Rights permits states to take special measures to derogate from some rights ‘in time of public emergency which threatens a life of nation’. Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR) does not enlist the right to fair trial under Article 14 among the category of non-derogable rights. But it does not imply that States facing an emergency can depart from the right to a fair trial as they see fit. Derogation measures must be consistent with the State’s other obligations under international law such as the norms of international humanitarian law, applicable during armed conflict. Those countries who are not party to the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty,⁵⁴ may they resort to capital punishment for the most serious crimes as per Article 6 of the International Covenant on Civil and Political Rights. Article 6 of the Covenant is non-derogable in its entirety, which means that any trial leading to the imposition of the death penalty during a state of emergency or armed conflict must conform to the provisions of the Covenant, including all the requirements of Article 14.

5.2. Working of Special Courts to Counter Terrorism in Pakistan, India and Pakistan and Violations of Due Process

5.2.1. The Special Courts in Pakistan and Right to Fair Trial

Overview

The main anti-terror framework in Pakistan includes Anti-terrorism courts working under the Anti-Terrorism Act 1997 and Military Courts established under Pakistan military Act 1952 amended in 2015. The Anti-Terrorism Act 1997 provides the basic legal framework for Pakistan’s national counter terrorism efforts. According to an Amnesty International Report more than 326 persons were executed during the year 2015, ‘the third highest number recorded globally’.⁵⁵ Many of those executed had in fact been convicted by Anti-Terrorism Courts, special courts established under the

⁵⁴ Article 1 outlaws capital punishment in all cases but article 2 permits reservation of the application of the death penalty in time of war, pursuant to a conviction for ‘a most serious crime of a military nature committed during war time’

⁵⁵ Amnesty International, *Death Sentences and Executions* (London: Amnesty International, 2016), p.26.

Anti-Terrorism Act of 1997, which the authorities have used to try defendants charged with offences under the Penal Code.⁵⁶

In 2015, under 21 Amendment to the Constitution of Pakistan, 11 military courts conducted the trials of the suspects in cases related to terrorism. According to the report of an NGO, 11 Military courts concluded the trial of 64 people, out of which 36 were sentenced to death and four were given life imprisonment⁵⁷. 8 out of the 36 people sentenced to death have been executed.⁵⁸

Rationale and Constitutionality of Anti-Terrorism and Military Courts in Pakistan

In 1998, the Supreme Court in *Mehram Ali and others versus Federation of Pakistan* validated the constitutionality of anti-terrorism courts subject to three amendments. First, the appointment of judges to the Anti-Terrorism Court must be for fixed tenures. Second, the working of the special courts should be subject to the Code of Criminal Procedure. Finally, appeals against the judgment of the Anti-Terrorism Courts must be heard by the regular High Courts and the Supreme Court.⁵⁹ The Supreme Court declared: ‘No objection can be taken to the establishment of special courts for speedy trials and prevention of terrorist acts/heinous offences under the Anti-Terrorism Act, 1997 because Article 37(d) of the Constitution of Pakistan enjoins upon the state to ensure inexpensive and expeditious justice’.⁶⁰ A recent study published by the United States Institute of Peace reveals: ‘After nearly two decades of functioning many of anti-terrorist courts now have trials running for several years’.⁶¹

In January 2015, Parliament passed the 21st constitutional amendment that amended Article 175 of the Constitution of Pakistan 1973 to provide jurisdiction to military courts for a period of two years to try civilians for terrorism-related offences.⁶² The constitutionality of the courts was challenged by the different Law Bar Associations of the country and the petitioners contended that the amendment is contradictory to

⁵⁶ Amnesty International, *Death Sentences and Executions* (London: Amnesty International, 2016), p.26

⁵⁷ International Commission of Jurists, Pakistan: The Trial of Civilian by Military Courts (Geneva: International Commission of Jurists, 2016), p.3.

⁵⁸ International Commission of Jurists, Pakistan: *The Trial of Civilian by Military Courts* (Geneva: International Commission of Jurists, 2016), p.3. ; According to the latest report published on August 29, 2016: The courts convicted 104 civilians, 100 of whom were sentenced to death’.

⁵⁹ *Mehram Ali and Others versus Federation of Pakistan* (PLD 1998 SC 1445).

⁶⁰ Ibid, para(bb).

⁶¹ Syed Manzar Abbas Zaidi, *Terrorism Prosecution in Pakistan* (Washington: United States Institute of Peace, 2016), p.6.

⁶² Constitution (Twenty First Amendment) Act, 2015, sec. (2).

principles of separation of powers recognized by Pakistan's Constitution and it would lead to violations of the rights to a fair trial and the independence of the judiciary.⁶³ In *District Bar Association v. Federation of Pakistan*,⁶⁴ the full bench of the Supreme Court held that the trial by military courts of individuals accused of terrorism offences who are known to or claim to be, members of terrorist groups was compatible with the Constitution particularly fundamental rights and the independence of judiciary.⁶⁵ The Court further maintained: 'Trials of civilians by Court Martial/Military Courts was an exception and could never be the rule, however the gravity of the current situation faced by the state of Pakistan and the intensity of the armed conflict warranted its description as threat of war'.⁶⁶ Furthermore, the Supreme Court enumerated the reasons for the failure of the regular criminal justice system to prosecute the terrorists: 'Logistical shortcomings and legal lacunae exposed witnesses, police investigators, prosecutions and judges to violence that impaired the working of the present criminal justice system'.⁶⁷ Instead of strengthening the criminal justice system it is a 'renewed reliance on the failed and blunt instruments of coercion and military force'.⁶⁸ In the Supreme Court judgment, Justice Ejaz Afzal in its dissenting opinion termed military courts as 'short cut' and 'palliative' to the problem'.⁶⁹

5.2.2. Incompatibility of Military Court's Proceedings with the Right to a Fair Trial

At least 27 convicts by the military courts filed appeals with civilian courts, alleging coercion of confessions and denial of access to lawyers and to evidence used against them according to Reuter's research and local media reports.⁷⁰ In the 16 cases that came before the Supreme Court, the full bench (five judges) dismissed the convicts' appeals and upheld the decisions of the military courts of awarding capital punishment and declared: 'It does not appear to be a case of no evidence or insufficient evidence nor the conclusions drawn appear to be blatantly unreasonable or wholly improbable. No illegality in the conduct of the trial exists. The Law and the

⁶³ District Bar Association v. Federation of Pakistan, PLD 2015 SC 401.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid, para (vv).

⁶⁷ Ibid, para (ggggg)..

⁶⁸ International Crisis Group, *Revisiting Counter-Terrorism Strategies in Pakistan: Opportunities and Pitfalls* (Brussels: International Crisis Group, 2015), p.25.

⁶⁹ PLD 2015 SC 401, p.769.

⁷⁰ Asad Hashmi, 'Pakistan's New Military Courts Challenged Over Abuse Claims' *Reuters* (Islamabad, 27 June 2016) <<http://www.reuters.com/article/us-pakistan-military-courts-insight-idUSKCN0ZD2ZI>> accessed 10 August 2016.

Rules, more particularly, those protecting the right of the accused were adhered to. No case of malice in law or *Coram Non Judice* was made out'.⁷¹

The following areas of the military courts are not in conformity with the national and international standards on fair trial:

Impartiality and Competence

Impartiality and competence of the Military Courts in Pakistan are seriously questioned as the judges of the military courts are serving army officers.⁷² As a part of military hierarchy one cannot risk career progression in the zeal to do complete justice. It was argued in *District Bar Association, Rawalpindi v. Federation of Pakistan* against the military courts as the Armed Forces were directly engaged in a fight with the terrorists, the investigator into the crime and the judge presiding the military court would certainly belong to the Armed Forces and therefore being party to the conflict, they may be held to be judges in their own cause.⁷³ The competency of Military Courts is not in conformity with national and internationally recognized standards regarding the qualification of a judge. To serve as a judge of the military court does not require any qualification in law or training for judicial work.⁷⁴

Public Hearing

The Pakistan Army Act 1952 does not guarantee public trials in Court Martial or public hearings in Court Martial appeals. The Amended Army Act allows judges of military courts to hold in camera trials and made a provision for proceedings through video link and the law allows judges of military courts to hold in camera trials, and keep the identities of individuals associated with the cases secret.⁷⁵ No one including human rights organizations and relatives are allowed to attend the proceedings of the courts.⁷⁶ Trials are held behind closed doors 'in itself is problematic in terms of access

⁷¹Supreme Court of Pakistan, Civil petition No.842 of 2016,3331,3332,3674 & 3777 of 2015,06.32,211,278,417,1263,1306,1335,1353,1503 and 1541 of 2016, (August 29,2016), para.286

⁷² Pakistan Army Act 1952(Amended in 2015), sec.85

⁷³ *District Bar Association, Rawalpindi v. Federation of Pakistan*, PLD 2015 SC 401.

⁷⁴ Pakistan Army Act 1952, section 85: a General Court Martial shall consist of not less than five officers each of whom has held a commission for not less than three whole years. Army Act1952, sec.87

⁷⁵ Tariq Butt, ' Military Courts to Hold Trials in Camera Counsel to be Allowed' The News(Lahore, January 12,2015) <<https://www.thenews.com.pk/print/17929-military-courts-to-hold-trials-in-camera-counsel-to-be-allowed>> accessed on August 11,2016.

⁷⁶The Guardian, Pakistan Empowers Military Courts to Pass Death Sentences on Civilians, 5 August 2015<<https://www.theguardian.com/world/2015/aug/05/pakistan-empowers-military-courts-to-pass-death-sentences-on-civilians>> accessed on August 11, 2016.

to fair trial'.⁷⁷ In *District Bar Association, Rawalpindi v. Federation of Pakistan*, the minority view identified that trials of the accused held by military courts behind closed doors as a violation of Article 10(A) 10(1) of the Constitution of Pakistan.⁷⁸ Recently Reuters examined 10 cases of capital sentences by the military court and interviewed the lawyers representing the accused who alleged that they were denied access to court records and were not allowed to meet their clients for the duration of the military trial.⁷⁹

The provision of secret trial is in violation of Article 14(1) of the International Covenant on Civil and Political Rights⁸⁰ Article 10 and 11 of the Universal Declaration of Human Rights require that except in narrowly defined circumstances all court hearings and judgments including criminal proceedings must be public.

Confession under Custody

The Code of Criminal Procedure does not admit confession under custody as evidence.⁸¹ In *Mehram Ali and others versus Federation of Pakistan*, the Supreme Court invalidated Section 26 under Ant-Terrorism Act, 1997 that allowed to treat confession in police custody recorded by not below the rank of Deputy Superintendent as evidence.⁸² The Court observed that the role of a police officer and a magistrate cannot be equated.⁸³ Consequently the section was not incorporated in the Anti-Terrorism Law 1997.

Reports of international non-governmental organizations, namely the International Commission of Jurists, Human Rights Watch and International Crisis group have shown concerns over death sentences awarded by courts which do not observe internationally recognized standards of fair trial. In a 2016 report, the International Commission of Jurists says: 'A clear violation of its legal obligations and political commitments to respect the right to life, the right to fair trial, and independence of judiciary'.⁸⁴ The report of International Crisis Group underlines: 'As the courts fall

⁷⁷ Syed Manzar Abbas Zaidi (n 61), p.6

⁷⁸ *District Bar Association, Rawalpindi v. Federation of Pakistan*, , PLD 2015 SC 401 , para.(eeeeee)

⁷⁹ Asad Hashmi, 'Pakistan's New Military Courts Challenged Over Abuse Claims' Reuters(Islamabad, June 27, 2016) <<http://www.reuters.com/article/us-pakistan-military-courts-insight-idUSKCN0ZD2ZI>> accessed 10 August 2016

⁸¹ Code of Criminal Procedure, 1898 as amended by Act 2 of 1997, section 162.

⁸² *Mehram Ali and others versus Federation of Pakistan*, PLD 1998 SC 1445, para(j).

⁸³ Ibid, para(j)

⁸⁴ International Commission of Jurists, *Pakistan: The Trial of Civilian by Military Courts* (Geneva: International Commission of Jurists, 2016), p.1.

far short of national or international fair trial standards, the risk of miscarriage of justice is unacceptably high'.⁸⁵ Human Rights Watch highlighted: 'Military courts are going to operate in secret and prohibit any meaningful public scrutiny and verification of their observance of fair trial'.⁸⁶

To conclude establishment of military courts to address the failures of the civilian justice system have not only made application of the death penalty arbitrary but it would frustrate Pakistan's struggle to create a professional and independent criminal justice system.

5.3 Anti-Terrorism Legislation in India and Due Process of Law

Overview:

The Government of India promulgated three different laws in different time periods mainly to stem separatists' movements in the states of Kashmir and Punjab. The legislative response of India to counter terrorism include the Terrorist Affected Areas (Special Courts) Act 1984, the Terrorism and Disruptive Activities (Prevention) Act, 1987-allowed to lapse in 1995, the Prevention of Terrorism Act 2002 (repealed in 2004), and Unlawful Activities Prevention Act, 2002, the Unlawful Activities(prevention) Act 1967(as amended in 2004 and 2008) and national Investigation Agency Act,2008. All of these special acts envisage the punishment of death for those charged with terrorist acts resulting in death.⁸⁷ The death row prisoners executed in India during the past couple of years were tried under the special courts constituted under anti-terrorist legislation.

Rationale and Constitutionality of Special Law

On many occasions the Supreme Court of India has upheld the constitutional validity of these laws by recognizing the gravity of the terrorist acts and the necessity of counter terrorism legislation. In *Kartar Singh v. State of Punjab*,⁸⁸ the Supreme Court discussed the need and purpose for the enactment of the anti-terror laws at length. The Supreme Court observed that terrorism is not an ordinary problem which can be

⁸⁵ International Crisis Group, *Revisiting Counter-Terrorism Strategies in Pakistan: Opportunities and Pitfalls* (Brussels: International Crisis Group,2015), pp.22-23.

⁸⁶ Phelim Kin, 'Dispatches: Hash Tag Injustice via Pakistan's Military Courts' April 6,2015 <<https://www.hrw.org/news/2015/04/06/dispatches-hashtag-injustice-pakistans-military-courts>> accessed on August 12,2016.

⁸⁷ The Unlawful Activities(Prevention) Act, 1967(UAPA), sec 16(1).

⁸⁸ *Kartar Singh Vs. State of Punjab* 1994 SCC (3) 569

tackled under the ordinary criminal laws of the land and that the enactment of special laws is imperative for dealing with a scourge of terrorism.⁸⁹ The Supreme Court further observed that ‘conceptually public order and terrorism are different not only in ideology and philosophy but also in cause or the *mens rea*’.⁹⁰ In the eyes of the Court: ‘Terrorism is a new crime far serious in nature, graver in impact, and highly dangerous in consequence’.⁹¹ The SC maintained in *Dilawar Hussain v. State of Gujrat* that TADA was adopted to deal with secessionist and terrorist activities against the State and not to cover ordinary crimes for which provisions exist in the Indian Penal Code.⁹² It was felt that ordinary criminal courts were not only overburdened but they also lacked facilities for the trial of terrorist-related offences. In *People’s Union for Civil liberties v. Union of India*, the Supreme Court upheld the constitutional validity of the Prevention of Terrorism Act (POTA) by arguing: ‘Fight against the overt and covert acts of terrorism is not a regular criminal justice endeavor. Rather it is defense of our nation and its citizens’.⁹³

5.3.1. Violations of Fair Trial Standards under TADA and POTA

Independence of the Court: The Terrorism and Disruptive Activities (Prevention) Act, 1987 (TADA) and the Prevention of Terrorism Act 2002 (POTA) empowered the Central Government to constitute Designated Courts⁹⁴ for the trial of the accused charged with terrorism related offences.⁹⁵ Under these laws, the special court was presided over by the sitting Sessions Judges appointed by the Central Government or, if applicable, the State Government with the concurrence of the Chief Justice of that State’s High Court.⁹⁶ Permitting the executive to constitute and appoint judges to the Special Courts creates the risk of political influence and violates the cardinal principle of judicial Independence. The United Nations Basic Principles on the Independence

⁸⁹ Ibid.

⁹⁰ Ibid, para. 446.

⁹¹ Ibid, para.446.

⁹² *Dilawar Hussain v. State of Gujrat*, 1990 SCR Supl. (2) 108, p.111.

⁹³ *People’s Union for Civil liberties v. Union of India*, AIR 2004 SC 456, p.460.

⁹⁴ The Terrorism and Disruptive Activities (Prevention) Act, 1987, section 9(1); The Prevention of Terrorism Act 2002, section 23(1).

⁹⁵ The Terrorism and Disruptive Activities (Prevention) Act, 1987, section 9(6); The Prevention of Terrorism Act, 2002.

⁹⁶ The Terrorism and Disruptive Activities (Prevention) Act, 1987, section 9. The Prevention of Terrorism Act, sec. 23-29.

of the Judiciary guarantee: ‘Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures’.⁹⁷

Remand Period or Police Custody

Unlike the Code of Criminal Procedure 1898, the TADA had increased the period of police remand up to sixty days and judicial remand up to 180 days.⁹⁸ But the Designated Court extended this period to one year on the report of the public prosecutor indicating reasons for the detention of the accused beyond the said period of 180 days.⁹⁹ The POTA Act under Section 49(2) allowed the detention of a suspect for up to 180 days without filing of charges in the Court.¹⁰⁰ It was argued that such a lengthy period of detention violated India’s constitutional guarantee to a speedy trial and also lead to custodial abuse and torture. This provision also violated Article 9(2) and 9(3) of the ICCPR which requires that all arrested persons be promptly informed of the charges against them and they be entitled to trial within a reasonable time or release.¹⁰¹

Confession under TADA and POTA

Both the TADA and POTA made confessions before the police officers admissible as evidence.¹⁰² It was a departure from the relevant provisions of the Code of Criminal Procedure Act, 1973 and the Indian Evidence Act, 1872¹⁰³ that do not accept confessions made under police custody as evidence. The Law Commission of India in its 185th Report, on the review of the Indian Evidence Act, disapproves the admissibility of confessions made to police officers. The Commission commented that the basis for introducing sections 25 and 26 in the Indian Evidence Act 1872 holds good even today.¹⁰⁴

The Supreme Court of India in *Kartar Singh v. State of Punjab* upheld the legality of this anomaly in the criminal procedure and declared that Section 15 of TADA does

⁹⁷ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 6 September 1985, and endorsed by UNGA RES. 40/32 of (29 November 1985) and 40/146 of (13 December 1985), Principle 5.

⁹⁸ Terrorist and Disruptive Activities(Prevention) Act,1987.

⁹⁹ The Terrorist and Disruptive Activities(Prevention) Act, 1987, sec. 20(4)(b).

¹⁰⁰ The Prevention of Terrorism Act, sec. 49(2)

¹⁰¹ International Covenant on Civil and Political Rights (adopted 16 December 1976, entered into force 23 March 1976) 999 UNTS 171(ICCPR), Art.9.

¹⁰² The Terrorism and Disruptive Activities (Prevention) Act, 1987 section 15; The Prevention of Terrorism Act, 2002, sec. 32

¹⁰³ The Indian Evidence Act, 1872, section 25, 26

¹⁰⁴ Law Commission of India, *Review of the Indian Evidence Act 1872* (Law Com No 185 ,2003)

not offend either Article 14 or Article 21 of the Constitution of India.¹⁰⁵ At the same time, the court issued guideline to adopt the procedure to make it ‘in conformity with the well-recognized and accepted principles and fundamental fairness’.¹⁰⁶ The Supreme Court left the task on the discretion of the judge of the Designated Court to decide the ‘question of admissibility or reliability of a confession in its judicial wisdom’.¹⁰⁷ In another case *State of Gujrat v. Mohammad Atik and others*, the Supreme Court accepted the petition of the public prosecutor. The Supreme Court validated a confessional statement recorded in accordance with the requirements contained in the section and set aside the decision of the trial court (Designated Court that had not accepted the confession under police custody as an evidence).¹⁰⁸

In judgment *People’s Union for Civil Liberties v. Union of India* the Supreme Court of India reiterated that a confession under police custody is admissible as evidence under POTA.¹⁰⁹ The Court maintained: ‘Parliament has taken into account all relevant factors in its totality and same is not unjust or unreasonable’.¹¹⁰ The Court reinforced the version of its previous judgment: ‘Non-inclusion of obvious and settled principle does not make the section invalid’.¹¹¹

It is common practice in the regular Indian Criminal Justice System that the investigating agencies and prosecutors extract evidence and use it as evidence to convict the accused or suspect. In a number of cases, the Supreme Court had confirmed the death penalty for the accused who had been convicted solely based on their confessional statements under the TADA and the POTA.¹¹² In this context, ample examples include Devender Pal Singh Bhullar,¹¹³ Afzal Guru,¹¹⁴ Yakub Abdul Razak Memon¹¹⁵ and Ajmal Qasab wherein the court upheld the death penalty based on confessional statements and circumstantial evidence. Davender Pal Singh was sentenced to death solely based on his confessional statements recorded by the

¹⁰⁵ *Kartar Singh v. State of Punjab* (1994) 3 SCC 569, para.260.

¹⁰⁶ *Ibid*, para.263

¹⁰⁷ *Ibid*, para.264

¹⁰⁸ *State of Gujrat v. Mohammad Atik and others*, (1998) 4 SCC 351.

¹⁰⁹ *People’s Union for Civil Liberties v. Union of India*, AIR 2004 SC 456, paras (478-79).

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

¹¹² Asian Centre for Human Rights, India: No Defense for Retention of Death Penalty (New Delhi: Asian Centre for Human Rights, 2015), p.63.

¹¹³ *Devender Pal Sigh Bhullar v. State* (NCT of Dlihi), (2002) 5 SCC 234.

¹¹⁴ *State (N.C.T of Delhi v. Navjot Sandhi @ Afsan Gru*.

¹¹⁵ *Yakub Abdul Razak Memon vs. The State of Maharashtra*

Deputy Commissioner of Police under Section 15 of the TADA. The bench of three judges confirmed the death sentence on 22 March 2002, Justice M.B. Shah delivered a dissenting opinion on the ground that ‘there was nothing to corroborate the confessional statement’ and it was not ‘voluntary and truthful’.¹¹⁶

In the case of Afzal Guru, the Supreme Court in its judgment held: ‘All these lapses and violations of procedural safeguards guaranteed in the statute itself implies us to hold that it is not safe to act on the alleged confessional statement of Afzal and place reliance on this item of evidence on which the prosecution places heavy reliance’.¹¹⁷

In another case *Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid*, the accused of the Mumbai Carnage popularly known as 26/11, was convicted on the basis of his confession.¹¹⁸ In the Case of *Yakub Abdul Razak Memon v. The State of Maharashtra* the Supreme Court confirmed the death sentence awarded by the designated court established under TADA on the basis of a confession by the co-accused: ‘The confessional statements of various co-accused mention that Tiger Memon has instructed them to stay in touch with A-1 for further instruction. Meaning thereby, A-1 assumed the role of Tiger Memon in India during his absence’.¹¹⁹

Presumption of Innocence

Both anti-terror legislation TADA and POTA made a marked departure from very crucial safeguard of the presumption of innocence. Under the TADA the burden of proof was shifted on the accused to prove his innocence.¹²⁰ It was also provided under POTA if the accused had rendered any financial assistance to any accused or suspect the Designated Court shall presume, unless the contrary is proved, that such person has committed any offence.¹²¹

5.3.2. Application of the Death Penalty under the Repealed/ Lapsed Anti-Terror Laws

In *Bachan Singh v. State of Punjab* the Supreme Court introduced the doctrine of ‘rarest of rare’ to retain capital punishment.¹²² Subsequently, the Supreme Court in

¹¹⁶ Devender Pal Singh Bhullar v. State (NCT of Delhi), (2002) 5 SCC 234.

¹¹⁷ State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru, AIR 2005 SC 3820, para.185.

¹¹⁸ Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v State of Maharashtra AIR 2012 SC 3565, paras.517-522,529.

¹¹⁹ *Yakub Abdul Razak Memon v. The State of Maharashtra*, writ petition (crl.) No.129 of 2015 dated July 29,2015, para.498.

¹²⁰ The Terrorist and Disruptive Activities (Prevention) Act,1987, sec.6

¹²¹ The Prevention of Terrorism Act 2002, Sec 53(2) The Terrorist and Disruptive Activities(Prevention) Act,1987, Sec.21(2).

¹²² *Bachan Singh v. State of Punjab*, AIR 1980 SC 898, para.207.

Machi Singh v. State of Punjab illustrated how to identify the rarest of rare cases: ‘When the murder is committed in an extremely brutal, grotesque, diabolical, revolting dastardly manner so as to arouse intense and extreme indignation of the community’.¹²³ The Supreme Court further elaborated: ‘When collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty’.¹²⁴ In light of the above cited judgments of the Supreme Court the courts in India justify the death penalty under the notion of ‘collective conscience’ especially in terror cases. In fact Judges in India ‘take upon themselves the responsibility of becoming oracles or spokesmen of public opinion’.¹²⁵

The notion of ‘collective conscience’ proved to be a fluid idea to implement capital punishment. Amnesty International’s study of Indian Supreme Court judgments in death penalty cases from 1950 to 2006 shows: ‘The determination of a crime as shocking the collective conscience’ has many nuances and differences and is influenced in ultimate analysis by the social and other perspectives of judges’.¹²⁶ Recently Surya Deva reviewed 86 cases decided by the Indian Supreme Court between January 2000 and October 2011 and concluded that ‘the Court’s application of the ‘rarest of rare’ guidelines of *Bachan Singh* is quite inconsistent and arbitrary’.¹²⁷ On November 20, 2012, the Supreme Court in *Sangeet and Anr vs State of Haryana* admitted: ‘Even though *Bachan Singh* intended a principled sentencing but sentencing has now really become judge centric’.¹²⁸

In two well reported cases of capital punishment the Supreme Court applied the notion of collective conscience subjectively: Firstly, Muhammad Afzal Guru was charged with complicity and conspiracy in committing an attack on the Indian Parliament in December 2001 under POTA and was sentenced to death by the Designated Court. Arundhati Roy, winner of Booker Prize for her novel in 1997, also

¹²³ *Machi Singh v. State of Punjab*, 1983(3) SCC 470, para. 431.

¹²⁴ *Ibid.*

¹²⁵ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

¹²⁶ Amnesty International & People’s Union for Civil Liberties, *Lethal Lottery: The Death Penalty in India* (London: Amnesty International, 2008), p. 19.

¹²⁷ Surya Deva, *Death Penalty in the Rarest of Rare cases: A critique of Judicial Choice Making* in Roger Hood & Surya Deva (eds.), *Confronting Capital Punishment in Asia* (Oxford: Oxford University Press, 2013) pp-238-256, p. 256.

¹²⁸ *Sangeet and Anr vs State of Haryana*, 2013(2) SCC 452.

endorsed the fact: ‘No direct evidence of Afzal Guru’s involvement was available’.¹²⁹ It is clear that even the prosecution did not accuse that Afzal was at the site of the attack or that he was responsible for killing any of the security forces.¹³⁰ The Supreme Court set aside the conviction under Section 3(2) of POTA. The Court also set aside the conviction under Section 3(5) of POTA because ‘there is no evidence that he is a member of a terrorist gang or a terrorist organization, once the confessional statement is excluded’.¹³¹ The Supreme Court upheld the sentence of death awarded by the special court on the following ground: ‘The incident which has resulted in heavy casualties has shaken the entire nation the collective conscience of the society will only be satisfied if capital punishment is awarded to the offender’.¹³² This judgment shocked many people across the India. Nandita Haksar wrote: ‘My sense of justice has been outraged by the judgment given by the courts’.¹³³

Secondly, Yaqub Mamon, executed in July 2015, was tried under TADA, charged with providing a logistic and financial support to those behind Bombay bloody bombing in March 1993. The Supreme Court commuted the death sentences of other 10 convicts to life imprisonment except Tiger Mamon.¹³⁴

Indian Law Commission Report on the Death Penalty shows concerns:

For one thing, these death sentences are implemented even when the underlying law in some of these cases has either been relapse (TADA) or has repealed (POTA). TADA in particular was repealed in the face of criticism for not respecting fair trial guarantees and amidst widespread allegations of abuse.¹³⁵

5.3.3. Incompatibility of Unlawful Activities Prevention Act 1967 (Amended in 2004 and 2008) with Fair Trial Standards

In 2004, with the repeal of POTA, the Unlawful Activities Prevention Act, 1967 was enacted with certain amendments. The Unlawful Activities Prevention Act as amended in 2004 had eliminated the TADA and POTA’s provisions concerning the admissibility of confessions before the police officers and the provisions of the Indian

¹²⁹ Arundhati Roy, *The Hanging of Afzal Guru and the Strange Case of the Attack on Indian Parliament* (India, Penguin books, 2006).

¹³⁰ The Amiya and B.G. Rao Foundation, *The Afzal Petition: A Quest for Justice* (New Delhi: Promilla, 2007), p.11.

¹³¹ State (NCT of Delhi v Navjot Sandhi @ Afsan Gru, (2005)11SCC 600.

¹³² Ibid, para.263

¹³³ Nandita Haksar, Framing Geelani, *Hanging Afzal: Patriotism in the Time of Terror* (New Delhi: Promilla & Co., Publishers, 2007), p.166.

¹³⁴ Yakub Abdul Razaq Memon v. State of Maharashtra, Criminal Appeal no. 1728 of 2007

¹³⁵ Law Commission of India, *The Death Penalty* (Law Com No. 262, 2015), para.2.5.8

Evidence Act 1872 and the Code of Criminal Procedure 1973 were made applicable in the matter of recording of the confessions. Similarly, in the 2008 Amendments of UAPA, confessions to the police were rendered inadmissible as evidence. The independence of the judiciary has also been restored with the disposal of POTA's Special Courts. At the same time many provisions of the repealed POTA were incorporated in the UAPA.

Presumption of Innocence

The UAPA as amended in 2004 restored the burden of proof on the prosecution. However in 2008, Section 43E was inserted which empowered the court to presume the accused guilty of terrorism if arms or explosives were recovered from his or her possession.¹³⁶ Moreover under this law the accused has to prove his/her innocence in case of 'the evidence of the expert including the finger prints of the accused or any other definitive evidence suggesting the involvement of the accused' found at the crime scene.¹³⁷ It means this provision allows the court presume the accused to be guilty merely on the basis of material evidence, without any need to establish any kind of mental element for the alleged offence.

Period of Remand

The UAPA as amended in 2008 made a departure from the Code of Criminal Procedure in respect of remanding the accused in a terrorism offence. The UAPA permitted the period of remand between 30 to 90 days to conduct investigation.¹³⁸ Moreover a proviso was inserted which provides that if it is not possible to complete the investigation within the said period of ninety days, the court may if it is satisfied with the report of the public prosecutor indicating the progress of the investigation and the specific reason for the detention of the accused beyond the said period of ninety days, extend the said period to one hundred and eighty days.¹³⁹ While the courts were obliged to grant extension of police custody beyond 90 days under POTA, the new provision under the UAPA leaves this at the discretion of the court.¹⁴⁰ The word 'shall' in POTA has been replaced by 'may' and this is a significant difference. This period of police remand multiplies the risk of torture to extract a confession.

¹³⁶ The Unlawful Activities (Prevention) Amendment Act(UAPA), sec 43(E)(a)

¹³⁷ Ibid sec 43(E)(a)

¹³⁸ Ibid sec 43D 2(a).

¹³⁹ Ibid sec 43D 2(b).

¹⁴⁰ Ibid.

In 2015, the Indian Law Commission report on the death penalty made a comprehensive analysis of anti-terrorism legislation including the Terrorism and Disruptive Activities Act 1987(TADA), the Prevention of Terrorism Act 2002 (POTA) and now the Unlawful Activities Prevention Act 1967 (UAPA) in these words:

Did not provide for the full range of fair trial guarantees: they defined offences vaguely, thus compromising the principal of legality, reversed the presumption of innocence in certain instances; allowed for a long period of pre-charge detention, made certain confession to specific police officials admissible as evidence and limited the right to appeal by allowing appeals to the Supreme Court.¹⁴¹

These special laws contain special provisions at the cost of deviating from some of the established basic principles of the Indian criminal justice system. Jayakumar summarized the anti-terror legislation in India in these words: ‘The way in which such a harsh law had found its entry into the statute book is itself a negation of constitutional and democratic values’.¹⁴²

5.4 The Anti-Terrorism Laws in Bangladesh and its Incompatibility with International Standards on Fair Trial

Overview

Bangladesh anti-terrorism legislation includes the Special Powers Act, 1974 and Anti-Terrorism Act, 2009. In this context, some special laws have also been promulgated: The Women and Children Repression Prevention Act of 1995. The law was repealed and replaced with Prevention of Oppression against Women and Children Act 2002 and The Acid Offences Prevention Act, 2002. Both the Special Powers Act of 1974 and the Anti-Terrorism Act of 2009 govern the prosecution of terrorist activities.

¹⁴¹ Indian Law Commission, *The Death Penalty* (Law Com No. 262, 2015), para. 2-5-6, pp.35-36

¹⁴² N. K. Jayakumar, Terrorism, Rule of Law and Human Rights in G. Gopa Kumar(eds.), *International Terrorism and Global Order in the Twenty –first Century* (2003), pp-71-88,pp.74,75

Independence of Tribunals

The Anti- Terrorism Act of 2009 empowers the Government to constitute special courts for effective and speedy trials of offences related to terrorism.¹⁴³ Section 28(2) of ATA States: ‘A Special Tribunal constituted under sub-section (1) shall consist of a Sessions Judge or an Additional Sessions Judge appointed by the Government in consultation with the Supreme Court’.¹⁴⁴ The wording of the provisions do not clearly spell out whether the Supreme Court disapproval of nominating a judge is binding on the government. With such lack of precision the independence of the Special Tribunal is not guaranteed.¹⁴⁵ The provision does not meet the condition of the independence of the Tribunal provided for by Article 14 of the International Covenant on Civil Political Rights.

Anti-Terrorism Surveillance legislation violates to right of Privacy and Fair Trial

Section 97-A of the Telecommunication (Amendment) Act of 2006 authorizes the investigating and intelligence agencies to engage in telecommunication surveillance and intelligence gathering such as tapping mobile or land phone lines, without a valid warrant.¹⁴⁶ Moreover, Section 97-B allows information recorded under section 97-A to be admissible evidence at trial under the Evidence Act of 1872.¹⁴⁷ It is an established principle that ‘a valuable role to be performed by the intelligence agencies in gathering information of relevance to subsequent criminal investigations but the function of intelligence for investigatory purposes and law enforcement are two functions that need to be kept distinct’.¹⁴⁸ This is clearly an arbitrary interference with the privacy provision of Article 17 of the ICCPR which states: ‘No one shall be subjected to arbitrary or unlawful interference with his privacy’.¹⁴⁹ Moreover the admission of such evidence during a trial undermines respect for the right to fair trial guaranteed by Article 14 of the ICCPR.

Conclusion

¹⁴³ Anti-Terrorist Act, 2009 (Act No. of 2009), section 24(1)

¹⁴⁴ Ibid, sec. 24(2).

¹⁴⁵ International Federation for Human Rights & Odhikar, *Bangladesh: Criminal Justice Through the Prism of Capital Punishment and the Fight against Terrorism* (Dhaka: Odhikar, 2010), p.30.

¹⁴⁶ Telecommunications (Amendment) Act 2006, section(97A).

¹⁴⁷ Telecommunications (Amendment) Act 2006, section(97B).

¹⁴⁸ Assessing Damage, *Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism* (Geneva: International Commission of Jurists, 2009), p.78

¹⁴⁹ International Federation for Human Rights & Odhikar, *Bangladesh: Criminal Justice Through the Prism of Capital Punishment and the Fight against Terrorism* (Dhaka: Odhikar, 2010), p.31.

Article 6(1) of the International Covenant on Civil and Political Rights categorically says: ‘No one shall be arbitrarily deprived of his life’.¹⁵⁰ Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) says: ‘Those countries who have not abolished the death penalty must apply in ‘most serious crimes’ The United Nations Human Rights Committee has consistently held that if article 14 of International Covenant on Civil and Political Rights (ICCPR) is violated during the criminal proceeding then Article 6 of the Covenant is also breached. In addition, the UN Economic and Social Council (ECOSOC) passed three resolutions¹⁵¹ prescribing safeguards regarding application of death penalty for those countries which have not abolished it yet. Safeguard 5 clearly expresses that capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial. The application of the death penalty for offences not resulting in loss of life and its trial without guarantee of fair trial is tantamount to an arbitrary deprivation of life.

The United Nations legal framework on counterterrorism including its protocols, conventions and resolutions of the Security Council, General Assembly and Commission on Human Rights, allows the members countries to make special legislation to criminalize acts of terrorism but it must be in consonance with all of its obligations under international law, in particular international human rights law, refugee law, and humanitarian law. In other words, international legal framework discourages to implicate the innocents in fight against terrorism. The international legal frame work allows the establishment of special or military courts to prosecute terrorists but such courts must remain the exception. It is mandatory that the independence and impartiality of special courts or tribunals must be ensured and they must observe the minimum guarantees of fair trial as enshrined in international human rights and humanitarian law.

In the name of security and the war on terrorism, India, Pakistan and Bangladesh have been applying capital punishment under the special courts constituted under special laws bypassing the under resourced and inefficient criminal justice systems to combat

¹⁵⁰ Ibid, art. 6.

¹⁵¹ *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Adopted by Economic and Social Council resolution 1984/50 of 25 May 1984; Implementation of the Safeguards Guaranteeing Protection of the Rights of those facing the death penalty, resolution No.1989/64 of 24 May 1989; Safeguards guaranteeing protection of the rights of those facing the death penalty, Resolution 1996/15 of (23 July,1996).

terrorism and other heinous offences. These extraordinary measures to counter terrorism have multiplied the risk of arbitrary application of the death penalty on the following grounds:

Firstly, the vaguely defined acts of terrorism under anti-terrorism legislations in the jurisdiction of three countries violate the principle of legality that requires that criminal liability and punishment be limited to clear and precise provisions. In the absence of a universally accepted definition of terrorism under international law, it provides a space to many states to prosecute acts of terrorism as capital offences which do not meet the threshold of ‘most serious crimes’ in light of Article 6(2) of the ICCPR. In this regard, the Human Rights Committee suggests that the offences related to a broad definition of terrorism¹⁵² and attacks against the internal security of the state¹⁵³ do not fall under the definition of the ‘most serious crimes’.

The special laws in Pakistan, India and Bangladesh have enhanced the scope of capital punishment by enlisting the terrorism related offences that do not meet the threshold of ‘most serious crimes’. In Pakistan, terrorism related offences that do not result in death include hijacking or assisting a hijacking,¹⁵⁴ kidnapping for ransom or hostage taking,¹⁵⁵ and attempt to harm railway passengers such as by explosion or derailment.¹⁵⁶ In India using any special category of explosives to cause an explosion likely to endanger life or cause serious damage to property is punishable by death.¹⁵⁷ The special laws of Bangladesh include the following as capital offences: ‘intentionally destroy or damage any property, whether movable or immovable, belonging to the Government¹⁵⁸, privation of eyesight, damage to the ear, disfiguration of the face or breast or sexual organ¹⁵⁹ and trafficking of woman for prostitution or to engage a woman in an illicit immoral Act’.¹⁶⁰

¹⁵² UNCHR ‘Comment on Egypt’s Second Periodic Report on Implementation of the ICCPR’ (9 August 1993) UN Doc CCPR/C/79/Add.23, para.8.

¹⁵³ UNCHR ‘Concluding Observations on Togo’s Third Periodic Report on Implementation of the ICCPR’ (28 November 2002) UN Doc CCPR/CO/76/TGO, para.10.

¹⁵⁴ The Anti -Terrorism Act 1997, sec 7(f), Pakistan Penal Code (Amended in 2006)1860, sec. 402.

¹⁵⁵ The Anti-Terrorism Act 1997, sec 7(e).

¹⁵⁶ Pakistan Railways Act 1980(amended in 1996), sec. 127.

¹⁵⁷ The Explosive Substances (Amendment) Act 2001, sec. 3(b).

¹⁵⁸ Bangladesh Explosive Substances (Amendment) Act 1987, art. 2.

¹⁵⁹ The Prevention of Oppression Against Women and Children Act 2000, Article 4(ii); The Acid Offences Control Act 2002, section 5(a).

¹⁶⁰ The Prevention of Oppression Against Women and Children Act 2000, art. 5(i).

Secondly, these special laws lower the general standards of due process and provides special powers of arrest and detention, validity to confession under police custody and reversing the presumption of innocence- the accused is guilty until his/her innocence is proven. The diminution in legal standards means a denial of basic human rights and their main function has been to put a legal veneer on state killings. In the name of speedy justice, these laws have been encouraging a culture of custodial torture and providing legitimacy to confessions as major evidence. In this context, during the previous years, India executed Ajmal Kasab, Afzal Gru and Yaqub Mamon who were charged with terrorism and sentenced to death under special laws to counter terrorism. All of them were convicted on the basis of confessions. Military courts in Pakistan during their working in the year 2015 convicted 40 persons, out of which 36 were sentenced to death on the basis of confessions. Though the right to legal defense exists in Pakistan Army Act, 1952, practically the accused were not provided legal assistance at the state's expense. The secret trials and the absence of public or media oversight, information about charges and available written judgment may make convictions easier but it enhances the probability of implicating the innocent. Execution of an innocent acts as a catalyst and not only churns out new terrorists but also weakens the rule of law in general and the criminal justice system in particular.

It is recommended that the governments of Pakistan, India and Bangladesh adopt an integrated approach by addressing the other factors contributing to flourish terrorism and must learn from the experience of other countries of the world, especially of two other South Asian countries, Sri Lanka and Nepal, which faced far more protracted and deadly insurgencies and act of terrorism but they never invoked capital punishment to protect national security.

Chapter 6

Capital Punishment under Sharia and its Application in Pakistan

Introduction

Under Article 227 of the Constitution of Pakistan, the state cannot enact the law that is repugnant to the Quran and the Sunnah.¹ This chapter aims at exploring the scope and application of capital punishment under the Quran and *Sunnah* and its application in Pakistan. In this regard, research relies on the basic sources of Islamic Jurisprudence (the Quran and Sunnah). In order to examine the effects of grafting the Qisas and Diyat Law 1997 into secular penal laws of the country on the prosecution of the offence of murder, the research analyzed reported cases of the High Courts and the Supreme Courts.

6.1 Sources of Islamic Law(Shari'ah)

The Shari'ah, Islamic Law, is mainly based upon two primary sources, the Qu'ran and the Sunna (sayings and deeds of the Prophet Muhammad).² The Quran and Sunnah legislate both man's duty to God, i.e, religious observances(ibadat) and his duties to his fellow man(mu 'amalat).³

6.1.2. The Qu'ran

All schools of thought of Islamic Jurisprudence have a firm belief that 'the Quran as a chief source is the root of all the other sources of Islamic legislation'.⁴ Several verses in the Quran expressly indicate that it is the basic and main source of law in Islam.⁵ Ahmad Hassan argues that the position of the Quran as the first and foremost basis for legal theory does not mean that 'it treats of every problem meticulously'.⁶

¹ The Constitution of Pakistan, 1973, art.227(1).

² Tahir Mahmood, 'Law Code in the Holy Qur'an' in Tahir Mahmood et al (eds.) *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (Delhi: Institute of Objective Studies, 1996), pp-3-35, p.3.

³ Barbara Freyer Stowasser, 'Religious Ideology, Women, and the Family: The Islamic Paradigm' in Barbara Freyer Stowasser (eds.), *The Islamic Impulse* (London: Croom Helm in Association with Centre for Contemporary Arab Studies, Georgetown University, 1987), p.262-296, p.262.

⁴ Mohammad Ibn Ibrahim Ibn Jubeir, 'General Studies: Criminal Jurisprudence & Comparative Law' in Tahir Mahmood et al (eds.), *Criminal Law in Islam and the Muslim World: A comparative Perspective* (Delhi: Institute of objective studies, 1996), pp-41-55, p.42.

⁵ Al- Quran 5:47,48,49,50.

⁶ Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), p.47.

The presentation of the details of legal rules does not fall under the basic objective of the divine book.⁷ The legislative part of the Quran is the model illustration for future legislation and does not constitute a legal code by itself.

Coulson evaluates the legal aspect of the Quran in these words: ‘A collection of piecemeal rulings on particular issues scattered over a wide variety of different topics’.⁸ Out of over 6200 verses (*ayat*), less than one-tenth relate to law and jurisprudence.⁹ There are close to 350 legal *Ayat* in the Quran most of which were revealed in response to problems that were actually encountered.¹⁰ There are about thirty *ayat* on crimes and penalties such as murder, highway robbery, adultery and false accusations.¹¹ Another thirty *ayat* speak of justice, equality, evidence, consultation, and rights and obligations of citizens.¹² In this regard, Bassiouni says: ‘The Quran does not set forth a complete system of criminal justice but it does contain the elements necessary for the construction by believers of a system of justice capable of being responsive to the needs of the society of a given place and time’.¹³

6.1.3. *Sunna or Hadith*

The Sunnah (literally meaning ‘beaten path’ or custom) is regarded as the second main source of Islamic Law. In the context of Islamic Jurisprudence, it refers to the model behavior of the prophet. Since the Holy Quran enjoins upon the Muslims to follow the conduct of the Prophet which is distinguished as ‘exemplary and great’.¹⁴ The Holy Quran has used the word *uswah hasana* for the exemplary conduct of the

⁷ All the followers of Islam believe that the Quran contains the words of Allah(God) revealed upon the Prophet and uttered by him in the presence of others who memorized these utterances and wrote fragments of them at that time but it was compiled into a book some forty years after the death of the Prophet Muhammad in 651AD.

⁸ Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press,1969), p.4.

⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society,2003), p.25.

¹⁰ Ibid, p.26. other speak of about 500 verses relevant for the law; Hallaq, History of Islamic Legal Theories,12.

¹¹ Ibid, p.27.

¹² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 2003), p.27; also see Imran Ahsan Khan Niazi, *Islamic Jurisprudence* (Islamabad: Adam Publishers, 2000), p.161. Niazi claims that about 70 verses pertain to family law, 80 to trade and finance,13 to oaths, 10 to constitutional and administrative matters,25 to international law and prisoners of war.

¹³ M. Cherif Bassiouni, ‘A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States’ in Barbara Freyer Stowasser (eds.), *The Islamic Impulse* (London: Croom Helm in Association with Centre for Contemporary Arab Studies, Georgetown University, 1987), p.244-254, p.247.

¹⁴ Al-Quran, Surah al-Ahzab, 33: 21.

prophet.¹⁵ The Quran makes obligatory to obey the Prophet.¹⁶ The Quran declared the prophet to be the interpreter of the Qur'anic text.¹⁷ Perhaps this is the reason why the *sunnah* is considered complementary to the Quran and supplementary to Quranic injunctions.¹⁸ It is the Sunnah of the Prophet that gives the concrete shape to the Quranic teachings.¹⁹ The Prophet Muhammad is reported to have said before his death, 'I leave two things among you. You shall not go astray so long as you hold on to them: the book of God and my sunnah'.²⁰

It is pertinent to mention that the Muslims do not take it as an institution prevalent among the Arabs tribes in the pre-Islamic days. The word *sunnah* up to the time of The Prophet meant the practice of antiquity.²¹ Alfred claimed that 'it means act and saying of the Prophet it has no relation to the Sunnah of the Arab tribes'.²² Khadduri claims that so far as Muslim jurists are concerned, Islamic law is unrelated to pre-Islamic law 'they scarcely had anything to do with pre-Islamic law'.²³

Hadith

The term *hadith* in Arabic literally means 'speech' or oral tradition. Loosely speaking, the terms *Sunnah* and *Hadith* convey the same meaning namely, the traditions of the Prophet.²⁴ Since the dominant method of transmitting reports containing the Sunnah of the prophet was oral, the term *hadith* was used to refer to that process of transmission. Eventually the two terms *Sunnah* and *hadith* were used interchangeably.

On the contrary to the undisputed status of the Quran, the authenticity and history of the writing down and compilation of *hadiths* have been areas of fierce debate among Muslims as well as among western scholars of *hadith*. The *hadith* is at once the

¹⁵ Al-Quran, Surah al-Ahzab, 33:21.

¹⁶ Al-Quran, Surah al-Muhammad, 47: 33.

¹⁷ Al-Quran, Surah An-Nahl, 16:44.

¹⁸ Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman, 1986), p.2; also see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 2003), p.27.

¹⁹ Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), p.49.

²⁰ Ibrahim ibn Musa Shatibi, *al-muwafaqat fi usul al-ahkam muwafaqat*, vol.3 (Cairo: 1922), p.197; Ibn Hisham, Vol. IV, p.276.

²¹ Alfred Guillaume, *The Traditions of Islam* (Oxford: Clarendon Press, 1924), p.11.

²² Ibid, p.12.

²³ Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, Baltimore, 1955), p.19. also see Majid Khadduri, *Islamic Jurisprudence: Shafi'i al-Risala* (Baltimore: The Johns Hopkins Press, 1961), p.6.

²⁴ Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), p.85.

strength and the weakness of Islam.²⁵ Sir William Muir writes: ‘About a hundred years after Muhammad, the caliph Umar II issued circular orders for the formal collection of all extant traditions’.²⁶ The complete record of the *sunnah* was compiled by Ishaq ibn Yassar 136 years after the death of the Prophet, in 11 AH.²⁷ As the traditions were not collected immediately after the death of the Prophet, any tradition or percept thereof has to pass the test of its being genuine’.²⁸ The debate over the authentic (*sahih*) is as extensive as the one over the interpretation of each hadith. Attempts by certain Muslim groups about the time of Imam Shafi to impose a clear formal distinction between the Quran and the extra Quranic component of the Islamic traditions are discernable²⁹ and it was chiefly to refute these efforts that Imam Shaafi composed his *Risala*.³⁰ As a father of Muslim jurisprudence, on the one hand ‘Imam Shafi maintains that Sunnah is a binding source of law and that there is no contradiction between the Quran and the Sunnah’.³¹ On the other hand, he acknowledged the necessity for human reason to provide legal rules for situations not expressly or specifically regulated by divine revelation. Reason could not operate as a source of law independent of the divine will’.³² All Muslim schools of thought consider authentic Sunnah (Sahih Sunnah) as a second major source of Sharia and ‘anti sunnah position failed completely’.³³ The Constitution of Pakistan recognizes the Quran and Sunnah as sources of Islamic law.³⁴

²⁵ Samuel Marinus Zwemer, *The Law of Apostasy in Islam* (London: Marshal Bros.1924). p.11

²⁶ Sir William Muir, *The Life of Muhammad from Original Sources* (Edinburgh: J. Grant, 1912), p.(xxxiii).

²⁷ The complete record of the Sunnah was compiled by Ishaq ibn Yassar 136 years after the death of the Prophet, in 11 AH, the most reliable sources of the Sunna are Imam Muhammad al Bukari, Al-Sahih al-Bukari (Imam al-Nawawi ed.,6 vols.,1924) which contains 7275 confirmed hadith, and Imam Muslim, al-Sahih Muslim. Imam al- Bukhari and Imam Muslim were contemporaries: they died respectively in AH 257 and AH 261.

²⁸ Dr. M. S. Rana, *Comparative Jurisprudence: A Study of the Philosophy and Reason of Original Sources of Islamic Law in Comparison with Western Thought* (Lahore: Law Publishing Company,1979), p.145.

²⁹ John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press,1990), p.22.

³⁰ Majid Khadduri, *Islamic Jurisprudence: Shafi i s Risala* (Baltimore: The Johns Hopkins Press,1961), p.179-180.

³¹ Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press,2004), p.107.

³² Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press,1969), p.6.

³³ John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (Edinburgh: Edinburgh University Press, 1990), p.25.

³⁴ The Constitution of Pakistan 1973, art. 227

6.1.4 Legislative Techniques-cum-sources of law

To address the issues which are not mentioned in the Quran or the *Sunnah*, Muslim jurists resort to legislative techniques –cum-sources of law. In Islamic Jurisprudence, *Ijtihad* encompassed issues not judged by the Quran or Sunna.³⁵ *Ijtihad* refers to the ‘jurists’ maximum effort to infer a legal judgment’.³⁶ *Ijma*: consensus of Jurists is the unanimous agreement reached by Muslim scholars during any period after the prophet’s death on any legal judgment bearing upon a particular situation or incident.³⁷ *Qiyas*: analogical deduction- *Ismah*: verdicts of infallible Imams in the Shi’ah law; *Istihsan*: juristic equity and al- Masalih al Mursalah(public interest).³⁸

In short, the basic material sources of Islamic Law are the Qur’an and the *Sunnah*. *Qiyas* and *Ijma* are, in fact, instruments or agencies for legislation on new problems for whose solution a direct guidance from the Quran and the *Sunnah* is not available. It is therefore, obvious that *Qiyas* and *Ijma* are considered to be an authoritative source of law being subservient to the Quran and the *Sunnah*. Ahmad Hassan emphasises that ‘the authenticity of these auxiliary sources shall be determined only by the degree of their consonance with the other two original and unchanged sources of law’.³⁹

6.2 Sanctity of Life and Prohibition of killing of the innocent in Sharia

According to the Quran man is the central creature and ultimate purpose of creation. In this regard, the Quran says that man is God’s vicegerent on earth ‘Your Lord said to the Angels: I am appointing a vicegerent on earth’.⁴⁰ Although the Quran accords human beings with the title of God’s Vicegerents’ on earth, but the act of giving life (*I’jad*) and taking it away (*I’dam*) as exclusively God’s prerogative. Thus, the terms *i,jad* and *i’dam* denote actions by God that human beings are not allowed to emulate.

³⁵ Mahgoub El-Tigani Mahmoud, *The Sources of Islamic Jurisprudence: Justice and Law in Islam* (Lewiston: The Edwin Mellen Press, 2014), p.175.

³⁶ Hasab –Ullah Ali, *Usul al-Tashri al-Islami* [Origins of Islamic Legislation] (Cairo: Dar al-Fikr al-Arabi, 1997), p.68.

³⁷ Mohammad Ibn Ibrahim Ibn Jubeir, ‘General Studies: Criminal Jurisprudence & Comparative Law’ in Tahir Mahmood et al(eds.) *Criminal Law in Islam and the Muslim World: A comparative Perspective* (Delhi: Institute of Objective Studies, 1996), pp-41-55, p.46.

³⁸ Tahir Mahmood, ‘Law Code in the Holy Qur’an’ in Tahir Mahmood et al (eds.) *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (Delhi: Institute of Objective Studies, 1996), pp-3-35, p.3.

³⁹ Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1970), p.42.

⁴⁰ Al- Quran, Surah al Baqra, 2:30.

The Prophet Muhammad has declared homicide as the greatest sin only next to polytheism.⁴¹

The Quran categorically denounces the killing of an innocent person: ‘On that account: We ordained for the Children of Israel that if any one slew a person - unless it be for murder or for spreading mischief in the land - it would be as if he slew the whole people: and if any one saved a life, it would be as if he saved the life of the whole people’.⁴²

In this verse of the Qur’an the word ‘soul’ (nafs) has been used in general terms without any distinction or particularization of race, religion and gender. In this regard, Abul A’la Mawdudi elucidates that ‘the injunction applies to all human beings and the destruction of human life in itself has been prohibited’.⁴³ Mahgoub El-Tigani Mahmoud says that ‘the act of murder was considered a crime against the whole society for whoever attacked a human body was guilty of attacking the universal human right to life’.⁴⁴ The state has no license to kill its citizens. Nor can the crimes of the State be justified on the authority of the Holy Qur’an or Traditions (*Hadith*) when the ‘state murders its citizens openly and secretly without any hesitation or on the slightest pretext, because they are opposed to its unjust policies and actions or criticize it for its misdeed’.⁴⁵

Allah ordains in the Holy Quran: ‘Take not life, which has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom’.⁴⁶ The Quran permitted the taking of a life only ‘by way of justice and law’ as a measure for preventing cycles of violence. Therefore, a man can be killed only when the law demands it. “Islam prohibits homicide but allows only one exception, that the killing is done through a due process of law which the Qur’an refers to as *bi’l-*

⁴¹ Mirza Iqbal Ashraf, *Islamic Philosophy of War and Peace* (Bloomington: I Universe, 2008), p.110.

⁴² Al- Quran, Surah Al-Maidah, 5:32

⁴³ Abul A’la Mawdudi, *Human Rights In Islam translated by Khurshid Ahmad* (Leicester: The Islamic Foundation, 1976), pp.17-18.

⁴⁴ Mahgoub El-Tigani Mahmoud, *Criminology and Penology in Islamic Jurisprudence* (Lewiston: The Edwin Mellen Press, 2015), p.81.

⁴⁵ Abul A’la Mawdudi, *Human Rights In Islam translated by Khurshid Ahmad* (Leicester: The Islamic Foundation, 1976), p.25.

⁴⁶ Al Quran, Surah Al-An’am, 6:151.

haqq (with the truth). The death penalty must not be invoked in an ‘arbitrary and capricious manner in violation to the principle of equality and due process’.⁴⁷

6.3. Concept of Justice, Crime and Punishment under Shariah

The Holy Quran does not give a dictionary definition of justice but it links the concept to the notions of equity⁴⁸, righteousness⁴⁹ and truth⁵⁰. The Holy Quran contrasts justice with transgression, falsehood⁵¹ and the disturbance in the natural order (*fitnah*). The concept of justice is usually related to, and connected with the concept of equality. In the eyes of law, it means that the law should treat those people equally who adhere to its rules and norms, regardless of their social, political or economic status. O ‘ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety’.⁵² ‘O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do’.⁵³ Allah ordains in the Quran: ‘Allah doth command you to render back your trusts to those whom they are due and when ye judge between man and man, that ye judge with justice’.⁵⁴ The Quran attributes paramount importance to justice and equity and God ‘loves those who are fair and just’.⁵⁵ Having a close look at the above injunctions or all the injunctions of Shariat as a whole, we find them universal in nature and everlasting and useful in character.⁵⁶ It paved the way for establishment of complete equality and justice.⁵⁷

⁴⁷ Mohammad Berween, ‘International Bills of Human Rights: An Islamic Critique’ in Abdullah Saeed (eds.) *Islam and Human Rights Vol. I: Key Issues in the Debate* (Cheltenham: Edward Elgar, 2012), pp-111-121, p.188.

⁴⁸ Al-Quran, Surah Al An’am, 6:152.

⁴⁹ Al-Quran, Surah Al Hadid, 57:25.

⁵⁰ Al-Quran, Surah Al Jathiyah, 45:22.

⁵¹ Al-Quran, Surah Al-Imran 3:25; al-Quran, Surah Al-An’am, 6:160; Al-Quran, Surah Al-Yusuf, 10:47; Al-Quran, Surah Al Nahl, 16:111.

⁵² Al-Quran, Surah Al-Maeda, 5:8.

⁵³ Al-Quran, Surah Al-Nisaa, 4:135 (English Translation by Abdullah Yousaf Ali).

⁵⁴ Al Quran, Surah Al Nisa, 4:58.

⁵⁵ Al-Quran, Surah Al Hujurat, 49:9.

⁵⁶ Abdul Qadir Audah, *Islamic System of Justice translated S.M. Hussain* (Karachi: International Islamic Publishers, 1982), p.38.

⁵⁷ Ibid, p.40.

The word crime(*juram*) has been used in many verses ⁵⁸ but the Quran does not, however, provide the definition of crime or the procedure to be adopted to prove an offence except in the case of zina and qazaf.⁵⁹ The literary period of Islamic law begins about the year 150 of the hijra (A.D. 767) and from then onwards the development of technical legal thought can be followed step by step from scholar to scholar.⁶⁰ The various schools of Islamic jurisprudence differed from one another according to their interpretation and knowledge of text, their customs, social environments, and their political allegiance.⁶¹ The second century of Islam saw tremendous and rapid development of technical legal thought.⁶² The Muslim Fuqha (jurists) defined crime 'in terms of punishments.'⁶³ The jurists defined a criminal offense by 'an action of killing, beating, wounding or assaulting a human self or body parts'.⁶⁴ The Islamic Jurisprudence categorized Islamic Criminal Law under three separate crimes (a) Hudood⁶⁵, (b) Qisas⁶⁶ (c) Tazir.⁶⁷ The punishment for the offence is called *hadd* because it prevents him to repeat the offence. The hudud penalties are also classified as right of God. For al-Mawardi and other jurists all of the *hudood* penalties were specially defined punishments.⁶⁸ Hence qisas was not part of the *hudood* because it referred mostly for the right of humans. The Shafities also acknowledge qisas as a hadd, which they saw as encompassing both homicide (qatl) and bodily harm(Jinyat).⁶⁹ The third category of crimes- the t'azeir discretionary

⁵⁸ Al-Quran, Surah al-Mursilat, 77: 46 ; al-Quran, Surah al-Anfal, 8:8; al-Quran, Surah Yunus, 10:82

⁵⁹ Al-Quran, Surah al-Nur, 24:4

⁶⁰ Joseph Schacht, *An Introduction To Islamic Law* (Oxford: Oxford University Press, 1964), p.40

⁶¹ Jamal J. Nasir, *The Islamic Law of Personal Status* (London: Graham & Trotman, 1986), p.3

⁶² For Iraq successive stages are represented by the doctrine which must be credited to Hammad(d.120/738) and by the doctrines of Ibn Abi Layla(d.148/765), of Abu Hanifa(d.150/767), of Abu Yousuf(182/798), and of Shaybani(d.189/805) respectively. The Syrian Awza'i(d.157/774) and Malik(d.179/795)

⁶³ Mahgoub El-Tigani Mahmoud, *The Sources of Islamic Jurisprudence: Justice and Law in Islam* (Lewiston: The Edwin Mellen Press, 2014), p.85

⁶⁴ Mansour Mohamed Hifnawi, *al-Shubhat wa Atharaha fil 'Uquba al-Jinayeya fi al-Fiqh al-Islami Muqarna bil-Qanun* [The Impact of Suspicions on Criminal Penalties in Islamic Jurisprudence Compared to Law] (Cairo: al-Amana Press, 1986), p.24.

⁶⁵ In Arabic language, the word Hadd is used in several different meanings, edge, border, extremity, terminus, limit.

⁶⁶ It means retaliation, homicide and personal injury formed the second type of offence-falling between hudud laws and torts.

⁶⁷ It means censure or reprimand. but it is discretionary punishment

⁶⁸ Mohamed Abu-Zahra, *al-Jarima wal-Uquba Fil Fiqh al-Islami* (Cairo: Dar al-Fikr al-Arabi, 1988), p.25

⁶⁹ Wael B. Hallaq, *Sharia: Theory, Practice, Transformation* (New York: Cambridge University Press, 2009), p. 31.

punishments that may Muslims rulers exercised ‘due to the absence of a Sharia’s text to determine the deserved penalty’.⁷⁰

The penalties of Islam were not readily legislated for random, arbitrary or spontaneous implementation. Muslim jurists exhibited concrete concerns over the authenticity of evidence, the legality of pre-trial investigation, and provision of sufficient space for post-trial revisions and corrections’.⁷¹ One of the distinctions of the application of criminal law under sharia is that it is applied on all humans, regardless of their status or role, whether they were members of the ruling elite or part of the ruled class.⁷² The laws of the Muslims were based upon equitable principles ‘ensuring to individuals perfect equality of rights’.⁷³ The sharia did not have a king with immunity from wrongdoing. Punishment in Islam, in general, advocated a principle of equality between the criminal act and its penalty, thus it was called qisas.⁷⁴ Punishment is justified in Islamic Law by deterrence, retribution, rehabilitation and the idea of protecting society by incapacitating the offender.⁷⁵

6.4 Capital offences under Hudood and Qisas Crimes

It is commonly understood that hudood laws prescribe fixed punishments for between five and seven types of crimes, depending upon the particular school of thought. According to the Hanafite and Shiite classification, the crimes under the category of hudood punishment are: Zina (adultery/ unlawful sexual intercourse), false allegation of adultery (qadhaf), the drinking of alcohol (shrub khamr), theft (sariqa), apostasy and banditry (qat ‘al-tariq, hiraba).⁷⁶ The punishments under the hadd may be enumerated as: death by stoning, amputation of a limb or limbs, flogging by hundred or eighty strikes.⁷⁷ The Pakistan Huddood Ordinance 1979, following the majority view,

⁷⁰ Mansour Mohamed Hifnawi, *al-Shubhat wa Atharaha fil ‘Uquba al-Jinayeeya fi al-Fiqh al-Islami Muqarna bil-Qanun* [The Impact of Suspicions on Criminal Penalties in Islamic Jurisprudence Compared to Law] (Cairo: al-Amana Press, 1986), p.37.

⁷¹ Mahgoub El-Tigani Mahmoud, *Criminology and Penology in Islamic Jurisprudence* (Lewiston: The Edwin Mellen Press, 2015), pp.165-166.

⁷² Ibid, p.140.

⁷³ Syed Amir Ali, *The Spirit of Islam: A History of the Evolution and Ideals of Islam with a Life of the Prophet* (London: Chatto & Windus, 1922), p.289.

⁷⁴ Mahgoub El-Tigani Mahmoud, *Criminology and Penology in Islamic Jurisprudence* (Lewiston: The Edwin Mellen Press, 2015), p.139.

⁷⁵ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), p.30.

⁷⁶ Ibid, p.53.

⁷⁷ Abdur Rahim, *The Principles of Muhammadan Jurisprudence: According to The Hanafi, Maliki, Shafi'i and Hanbali Schools* (London: Luzac & Co, 1911), p. 362.

recognizes five crimes as hudood offences: Zina⁷⁸, Qadhf⁷⁹, Sariqa⁸⁰, and Khamer.⁸¹ Keeping in view the scope of the research, only capital offences would be discussed in detail: Zina,(adultery) and Apostasy.

6.4.1 Zina (Adultery)

Muslim jurists treat it as both a sin and crime. The criminalization of adultery predates Islam and can be traced to a period as early as the Hebrew Bible.⁸² The penalty of stoning to death (rajam) most commonly associated with zina is not specifically mentioned in the Quran. The Quran prescribes the punishment of the offence of Zina: ‘The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes.’⁸³ The Quranic verse is clear in stating that the punishment of flogging is for the adulterer, without any distinction between married or unmarried people or virgin.⁸⁴ Imam Razi records: ‘All are agreed that the punishment of one hundred strips is applicable to all types of delinquents’.⁸⁵ The punishment of flogging may be supported by two arguments:

The first argument is based upon the evidence from the other verse of the Quran that states: ‘And when they are honorably married, they commit lewdness, they shall incur half of the punishment (prescribed) for a free woman in that case’.⁸⁶ Now ‘half of the punishment for a free women’ can be one half of one hundreds strips, that is fifty, but the use of stoning as punishment cannot be halved. Hence, the penalty referred to must be flogging mentioned in the relevant verse.⁸⁷

The second argument: It is perfectly possible that the death penalty by stoning for the offence of zina was practiced before the Quranic verse in surah 24 which abrogated it Muhammad Sharif says that *Surah al-Nur* (Chapter xxiv) which prescribes the punishment for *zina* was revealed between the 5th and the 6th Hijra and before that no

⁷⁸ Offence of Zina (Enforcement of Hudood) Ordinance (1979) (Pak.) (prohibiting adultery and fornication).

⁷⁹ Offence of Qazf (Enforcement of Hadd) Ordinance (1979), (prohibiting false allegations of adultery).

⁸⁰ Offences Against Property (Enforcement of Hudood) Ordinance (1979) (Pak.) (prohibiting theft)

⁸¹ Prohibition (Enforcement of Hadd) Order (1979) (Pak.) (prohibiting the consumption of intoxicants).

⁸² Deuteronomy 22:22.

⁸³ Al-Quran, Surah Al-Noor, 24: 2.

⁸⁴ Muhammad Sharif, *Crimes and Punishment in Islam* (Lahore: Institute of Islamic Culture, 1972), p.16.

⁸⁵ Fakhr al-Din al- Razi, *Mafateeh al-Ghayb* (Tafsir al Kabir) , Volume VI, p.214.

⁸⁶ Al-Quran, Surah An-Nisa, 4:25.

⁸⁷ Al-Quran, Surah An-Nur, 24:2.

specific punishment for Zina was provided in the Quran.⁸⁸ The punishment of Rajam (stoned to death) was only enforced in Abrahamic traditions (Judaism and Christianity) which predated Islam, but was then abrogated by the relevant Quranic verse defining the punishment as flogging. The reference to this aspect of Jewish law may be found in the New Testament.⁸⁹ In this connection, a Tradition recorded in *Bukhari Sharif* also corroborates the stance. Shaibani inquired from ‘Abdullah son of Abi Aufa whether the Prophet had anyone stoned to death. He said, ‘Yes’. Was it before Surah al Nur or after? The reply was that he did not know.⁹⁰

Despite this fact, it is widely held view among traditionalist commentators of the Quran that this verse applies only to unmarried men and women, including Hanfi,⁹¹ Shafi⁹², Hanbli⁹³ and Shia school of sharia law⁹⁴ support the punishment of stoning (*rajam*) for a married adulterer. The Muslim Jurists understood the hadith corpus to authorize stoning for adultery, a norm that the second caliph of Islam, Umar reportedly affirmed emphatically: ‘That those who committed adultery were to receive a penalty of death by stoning’.⁹⁵ In one of these cases, a woman came to the Prophet to confess her adultery. The Prophet asked if there were witnesses, but there were none. She insisted that her confession be received, but the prophet insisted that she return four times in order for her reiterated confession to be deemed equivalent to four eyewitnesses. When she did that, he still insisted that she corroborates her confession with external evidence. She then confessed to being pregnant. The Prophet, clearly wanting to avoid applying the penalty, deferred it until she gave birth, because otherwise the penalty would affect her unborn child. Eight months later, she returned, but the prophet again refused to apply the penalty because she had to breastfeed the child, and he asked her to return nine months later. When she returned he asked her if she wanted to recant her confession, but she confirmed it. He then felt

⁸⁸ Muhammad Sharif, *Crimes and Punishment in Islam* (Lahore: Institute of Islamic Culture, 1972), p.15.

⁸⁹ In St John, Chapter viii verses 3-11 described the case of a woman ‘taken in adultery’ and produced before Jesus. “Now in the law Moses commanded us to stone such: what then sayest thou of her? Jesus said: He that is without sin among you, let him first cast a stone at her.

⁹⁰ Sahih Bukari: book 87, Volume II, p.1484 of the Urdu Translation by Maulvi Muhammad ,Ali.

⁹¹ Imam Abu Hanifa, 80-150 AH/699-767 A.D; Imam Malik 93-179 A.H/712-795 AD; and.

⁹² Imam Shafi 150-204 AH/767-820 AD.

⁹³ Imam Ahmad Bin Hanbal, 164-241 A.H/780-850 A.D.

⁹⁴ The followers of Ali became more visible during Ali war with Muawiya. As a system, it became known as the Jaffery School since it was founded by their sixth Imam, Imam Jafar as Sadiq (80-140 A.H., 699-765 A.D).

⁹⁵ Hossein Modarressi, ‘Early Debates on the Integrity of the Quran: A Brief Survey’ (1993) 77 *Studia Islamica* 5, pp.5-39.

that he had no choice but to order the penalty carried out. When his companions returned from the stoning, he asked them if they had heard her recant. They asked why and he said that, if she had, they should have stopped the stoning.

A man by the name of Maiz, came to the Prophet and begged the prophet to punish him. The Prophet initially sent Maiz away, declining to hear the case. Maiz came back a second time renewing his confession and requesting punishment. On the fourth time the prophet finally spoke and confirmed his neighbor whether the defendant was of sound mind. Maiz insisted that he was of sound mind and had committed adultery within the full meaning of the term. Eventually, the Prophet found Maiz guilty but did not punish him. Not waiting for specific instructions from the Prophet, the people of the town themselves decided to enforce the harsher of the punishments: death by stoning. When they informed the prophet of what they have done, he exclaimed in dismay that they “should have let Maiz go. He further remarked that if Maiz had repented, God surely would have accepted his repentance.”⁹⁶

The application of the punishment is ‘only in rare cases’ due to stringent evidentiary requirements.⁹⁷ The Quran says: ‘if any of your women are guilty of lewdness take evidence of four, witnesses from amongst you, against them’.⁹⁸ It is essential that the four witnesses must have witnessed actual discourse and full penetration. Aly Mansour writes, ‘It is nearly impossible to satisfy the pre-requisite for an eyewitness, unless the act is performed openly and publically’.⁹⁹ The only mode of proof thus left is confession.¹⁰⁰ The offender has to swear four times that he has actually committed adultery and in his confession he should give sufficient details to dispel any doubts.¹⁰¹ A jurist argues that only the deterrent effect of punishment in Islamic law is meant by

⁹⁶ Muhammad b. Ismail al Bukhari, sahih.no.6438.

⁹⁷ Abdur Rahim, *The Principles of Muhammadan Jurisprudence: According to The Hanafi, Maliki, Shafi'i and Hanbali Schools* (London: Luzac & Co, 1911), p.360.

⁹⁸ Al-Quran, Surah Al-nisa, 5:15-16.

⁹⁹ Aly Mansour, ‘Hudud Crimes’ in M. Cherif Bassiouni (eds.), *The Islamic Criminal Justice System* (Rome: Oceana publications, 1982), pp.195-201, p. 199.

¹⁰⁰ Faizan Mustafa, ‘Offence of Adultery under Islamic and Some Other Law: A Comparison’ in Tahir Mahmood et al(Eds.), *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (New Delhi: Institute of Objective Studies, 1966) pp-242-255, p.252.

¹⁰¹ Omar Ibn Abdul Aziz al Mutrak, Sexual Offences in Islamic Criminal law: Textual Foundations, in Tahir Mahmood et al (eds.), *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (New Delhi: Institute of Objective Studies, 1966), pp-212-222, p.217.

the Law of adultery.¹⁰² Rahim argues that the punishment is only for ‘those offenders who defy public decency and openly flaunt their vices’.¹⁰³

In addition to the requirement of four eye witnesses, the possibility of being punished for qadhf (false accusation of un-chastity) deter the witness to give false evidence. The Quran further says: ‘And those who launch a charge against chaste women, and produce not four witnesses, flog them with eighty stripes’ and reject their evidence ever after: for such men are wicked and transgressors’.¹⁰⁴ Coulson remarks that the strict burden of proof imposed upon prosecutor requires to a high degree of certainty that reaches its zenith: ‘It is better for several actual offenders to escape liability than for one innocent person to suffer liability’.¹⁰⁵

The above two quoted hadith determine the essential parameters of the Islamic criminal justice system. It means that ‘Islam urged the rehabilitation of offenders and diversified the paths of repentance for them to maximize the private prevention of crime’.¹⁰⁶ The *Hudood* penalties were indeed harsh to terrorize criminals- that is why the hudud application should be narrowed to the maximum degree possible to allow the intrinsic legitimacy of the application to deter criminals’.¹⁰⁷

Punishment of Zina(adultery) under the Pakistan Hudood Ordinance

Under the Offence of Zina(Enforcement of Hudood) Ordinance,1979, the act of adultery by a married person if witnessed by four male Muslims of good character, could be punished by stoning to death.¹⁰⁸ Section 17 of the ordinance prescribes the mode of punishment of stoning to death.¹⁰⁹ Since the promulgation of the law, stoning has never been officially implemented in any case but the law furnished an opportunity to the players in the criminal justice system to vent their gender and

¹⁰² Sheikh Muhammad Mustafa Shalabi, *Al-Fiqh al-Islami Bayn al Mithlly ‘ah wal-waq’iyah*, (Alexandria:1960), p.207.

¹⁰³ Abdur Rahim, *The Principles of Muhammadan Jurisprudence: According to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (London: Luzac & Co, 1911), p. 362.

¹⁰⁴ Al-Quran, Surah Al-Nur, 24:5.

¹⁰⁵ Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press,1969), pp.64-65.

¹⁰⁶ Mahgoub El-Tigani Mahmoud, *Criminology and Penology in Islamic Jurisprudence* (Lewiston: The Edwin Mellen Press, 2015), p.165.

¹⁰⁷ Mohamed Abu-Zahra, *al-Jarima wal-Uqoba Fil Fiqh al-Islami* (Cairo:Dar al-Fikr al –Arabi,1988), p.178.

¹⁰⁸ Offence of Zina (Enforcement of Hudood) Ordinance, 1979, section 4, 5(1), 5(2)(a), 8(b)

¹⁰⁹ Ibid, section.17.

patriarchal biases while processing cases under them.¹¹⁰ Against this backdrop, many government-appointed commissions also found the violations of fundamental rights guaranteed in the Constitution of Pakistan and recommended its repeal.¹¹¹

After 26 years, the Government of Pakistan amended the Ordinance and the amended law itself explains its objective to 'provide relief and protection to women against misuse and abuse of law'.¹¹² *The Protection of Women ACT 2006* also provides for stoning in the case of rape or adultery (as Hadd offenses) but are legislatively demoted from overriding status.¹¹³ The Protection of Women Act inserted the offences of unnatural lust, rape,¹¹⁴ and gang rape¹¹⁵ into the Pakistan Penal Code as a *Tazir* offence punishable by death. Martin Lau argues that complete repeal of the Zina Ordinance would be difficult without new Constitution of Pakistan.¹¹⁶

In line with the international guidelines to abolish the penalty of death for crimes related to sex and religion, the Government of Pakistan requires a paradigm shift in its approach of interpretation of the Quran and Sunnah rather than reliance on the classical Islamic Jurisprudence. In 1981, the Federal Shariat Court in *Hazoor Bakhsh v. Federation of Pakistan* declared that the punishment of stoning to death was unislamic.¹¹⁷ The judgment provoked the wrath of the President of Pakistan and religious parties and the President promulgated an ordinance to empower the Federal Shariat Court to review its own judgment.¹¹⁸ Subsequently the judgment was reversed in a review filed by the Federal Government under the pressure from religious

¹¹⁰ Niaz A. Shah, *Women, the Koran and International Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2006), p.147; Shahnaz Khan, Zina And the Moral Regulation of Pakistani Women, (2003) 75(1) *Feminists Review* 75, pp-75-100, p.77; Ziba Mir Hosseini, 'Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts' (2011) 15(8) *Sur-International Journal on Human Rights* 7, pp-7-34, p.14.

¹¹¹ A Report of a Commission of Inquiry for women, 1997; Report by National Commission for the Status of Women Analysis of the Hudood Ordinances.

¹¹² Protection of Women Act, 2006, Statement of Objects and Reasons.

¹¹³ Protection of Women Act 2006, sec. 376.

¹¹⁴ Pakistan Penal Code, sec. 375.

¹¹⁵ Pakistan Penal Code, sec. 376.

¹¹⁶ Martin Lau 'Twenty-Five Years of Hudood Ordinances-A Review' (2007) 64 *Washington and Lee Review* 1291, p.1314.

¹¹⁷ *Hazoor Bakhsh vs. Federation of Pakistan*, PLD 1981 FSC 145; Three judges declared stoning to death as an un-islamic, one maintained stoning to death as a part of Tazir sentence and not Hadd. one of them disagreed with the majority view altogether and maintained stoning to death as an islamic punishment.

¹¹⁸ Constitution (Amendment) Order 1981 (P.O.No.5 of 1981) section 3(w.e.f. April 13, 1981)

factions.¹¹⁹ It is rightly observed: ‘The judges were immediately replaced but the court’s role in acquitting people accused of *hadd* offenses has remained intact’.¹²⁰ In this context, in 2007, the Legal Committee of the Council of Islamic Ideology recommended that the punishment for the offence of zina (adultery) be 100 hundred lashes not stoned to death.¹²¹

6.4.2. Apostasy (Ridda, irtidad)

The Arabic equivalent for apostasy is *riddah* or irtid from the root *radd* which among other connotations has the meaning to retreat, to retire, to withdraw from or fall back from. Apostate is known as *Murtad*.¹²² In the context of Sharia it is equated with renunciation or abandonment of Islam by one who professes the Islamic faith.¹²³ In fact, apostasy is not mentioned as a capital offence in the Quran. The Quranic verses condemn apostasy but its punishment is restricted for divine justice in the hereafter.¹²⁴

Some Muslim Scholars inferred the punishment of apostasy as death from the interpretation of the following two verses:

In Surah Al-Baqra, The Quran ordains: ‘And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever - for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire, they will abide therein eternally’.¹²⁵

The word used in the Arabic text *fa-yamut* is significant. Some scholars made the interpretation that the verse clearly envisages the natural death of the renegade after apostasy. Sheikh Ismail Haqqi, in his commentary *Ruh al-Bayan* says in respect of this verse: This contains a warning against apostasy and in it is inducement to revert to Islam, after apostasy, till the time of death’.¹²⁶ Fakhr –ud-Din –ar-Razi also

¹¹⁹ Asma Jahangir & Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Sang-e-Meel publications, 2003), p.29.

¹²⁰ Maarten G. Barends, ‘Shari’a in Pakistan’ in Paul Marshal (eds.), *Radical Islam’s Rules: The Worldwide Spread of Extreme Shari’a Law* (London: Rowman & Littlefield, 2005), pp.65-85, p.70.

¹²¹ Muhammad Khalid Masud, *A Critical Report on Hudood Ordinance 1979* (Islamabad: Council of Islamic Ideology, 2007), p.162. Council of Islamic Ideology <<http://cii.gov.pk/Publicationss.aspx>> accessed 7 April, 2016.

¹²² Mohammad SEL-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis: American Trust Publication, 1982), pp-49-50.

¹²³ Irtidad and ridda-the later term relates to apostasy from Islam into belief Kufer; the former from Islam to another religion for example Christianity

¹²⁴ W. Heffening, Murtad in *7 The Encyclopedia of Islam* 635(C.E. Bosworth et al. ed, 1992

¹²⁵ Al-Quran, Surah Al-Baqrah, 2: 217.

¹²⁶ Sheikh Ismail Haqqi, *Tafsir Ruh al-Bayan*, Vol. I, pp.335.

endorsed the same translation.¹²⁷ The consequences of such apostasy are declared in the verse to be ‘his deprivation of fruits of Islam enjoyed by Muslims in this world and life after the death’.¹²⁸

In the sub-continent Muhammad Abu'l A-la Maududi has relied on Quranic verses 11-12 from *Surah Taubah*.¹²⁹ ‘If they break their oaths after their covenant, and revile your religion, then fight these leaders of disbelief surely, they have no regard for their oaths- that they may desist’.¹³⁰ He construes the word *ahd* ‘as meaning a covenant to accept Islam’. This construction, generally speaking, is not endorsed by any of the well-known commentaries, published in the Indo-Pak subcontinent or abroad¹³¹ take the term ‘*ahd*’ as equivalent to a political pact and in their comments on these verses, given the history of the agreements between the Muslims and the disbelieving Qurash. The standard exegetical works of Baidawi¹³², Fakhr-ud-Din al-Razi¹³³ and Rashid Rida¹³⁴ also interpret the word *ahad* as: These verses clearly relate to the *mushrikin*(polytheists) of Arabia and not to apostates. The object of the fighting against infidels specified at the end of the verse is to make them desist (from their actions). If the persons concerned were to be killed for apostasy, there should have been no question of an attempt to making them desist from their course. The fight with the leaders of disbelief can be none other than fighting with the leaders of a movement of apostasy.¹³⁵

Majority of Muslim jurists have classified apostasy as a *hadd* punishable by death as mainly relying upon traditions of companions of the Prophet.¹³⁶ The primary

¹²⁷ Fakhr –ul-Din –al-Razi, *al-Tafsir al-Kabir Vol.ii*, (Cairo: 1308), p.220, lines 17 to 20.

¹²⁸ Abil-Fadal Shihab al -Din- Sayyed Muhammad, Alusi Baghdadi, *Ruh al-Ma ani fi Tafsir al Quran al- ‘Azim wa- l’-Sab’al-Mathni*;

¹²⁹ Abu’a’-l- A-la al- Maududi, *Murtadd Ki Saza Islami Qanun Men* (The Punishment of Apostasy in the Islamic Law) (Lahore: Markazi Maktaba Jama ati Islami, 1951), pp.11-12.

¹³⁰ al-Quran, Surah Taubah :12

¹³¹ Maulana Ashraf Ali Thanwi, Maulana Shah Muhammad Ahmad Raza Khan Bareilvi Maulana Abul Kalam Azad Mr. Abdullah Yusuf

¹³² Muhammad Al- Baidawi, *Tafsir al-Jalayin of al-Suyuti and al-Mahalli, vol. I* (Cairo: Matba’ah Mustafa al-Babi al-Halabi,1939), p.340.

¹³³ Fakhr-ud-Din al-Razi, *Mafatih al-Ghaib (Tafsir al-Kabir),vol.(iv)* (Cairo: Matba at al-Amirat al-sharafiyyah, 1308),p.416.

¹³⁴ Muhammad Abduh and Muhammad Rashid Rida, *Tafsir al-Quran al-Hakim-Tafsir al-Manar vol. X* (Cairo: Matba’at al-Manar,1931), pp.187-91

¹³⁵ Mirza Tahir Ahmad, *The Truth About the Alleged Punishment for Apostasy in Islam* (Surrey: Islam International Publications,2005), p.53.

¹³⁶ Mansure AliNasif, Al-Taj al-Jami Lil-Usul,4th edition (Cairo: Dar Ilhya al-Kutab al-Arabi,1961),p.18; Muhammad Hamidullah, *Muslim Conduct of State*(Lahore: Sh. Muhammad Ashraf, 1945),p.161.

justification for the execution of the apostate is that in the early days of Islam apostasy was ‘tantamount to the renunciation of allegiance to the Islamic Commonwealth’.¹³⁷ Capital punishment for the offence of apostasy developed during the early Islamic empire.¹³⁸ The reports pertaining to the *Khilafat –i-Rashidah* reveals some incidents which included an element of active hostility to Muslims. It is reported that the first Caliph of Islam, Abu Baker, ordered an apostate to be killed.¹³⁹ Majid Khadduri argues that the tradition that all apostates be killed had its origin during these wars of rebellion and not during the Prophet Muhammad’s time.¹⁴⁰ The decision and practice of Abubakar, consensus of the opinion of other Companions of the Prophet, and later Muslim jurists, all prescribe capital punishment for the apostate.¹⁴¹ S.A Rehman argues that the occurrences during the regimes of the four rightly guided caliphs were illustrations of requital for active hostility or social disruption and not merely for peaceful dissent from the truth, after its initial acceptance.¹⁴² Zwemer also reinforces that laws and practices in regard to the apostate from Islam became more rigid ‘after the Muslim state extended its domain and authority beyond Arabia’.¹⁴³

Most of the Muslims scholars¹⁴⁴ accept and agree that the laws relating to riddah (apostasy) and blasphemy in jurisprudence do not only violate the right to freedom of religion but also the fundamental principle of freedom of belief in religion, as enshrined in the Quran.¹⁴⁵ This punishment is contradictory to the Quran that categorically asserts: ‘There shall be no compulsion in [acceptance of] the religion’.¹⁴⁶ The *Tafsir al-Manar* describes the commandment contained in this verse as one of the greatest principles of the Islamic faith and one of the majestic pillars of

¹³⁷ Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (London: Oxford University Press, 1964), pp.169-70.

¹³⁸ W. Heffening, ‘Murtad in Islam’ in Clifford Edmund Bosworth et al. (eds.), *The Encyclopedia of Islam* (Leiden: Brill,1992), p.635.

¹³⁹ Samuel Marinus Zwemer, *The Law of Apostasy in Islam* (London: Marshal Bros.1924).p.35.

¹⁴⁰ Majid Khadduri, *The Islamic Concept of Justice* (1978), p.238.

¹⁴¹ N. Hanif, *Islamic Concept of Crime and Justice*, volume 2 (New Delhi: Sarup & Sons 1999), p.180.

¹⁴² S. A. Rehman, *Punishment of Apostasy in Islam* (Lahore: Institute of Islamic Culture,1972), p.132.

¹⁴³ Samuel Marinus Zwemer, *The Law of Apostasy in Islam* (London: Marshal Bros.1924). p.9.

¹⁴⁴ Muhammad Abduh and Muhammad Rashid Rida, *Tafsir al-Quran al-Hakim-Tafsir al-Manar*, vol.5(Cairo: Matba’at al-Manar,1931):327; S.A Rahman, *Punishment of Apostasy in Islam*, ch.2 and El-Awa, *Punishment in Islamic Law*, ch.2.

¹⁴⁵ Abdullahi Ahmad An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990), p.184.

¹⁴⁶ al-Quran, Surah Al-Baqarah,2:256.

Islamic polity (Siyasah).¹⁴⁷ It further elaborates that 'it is not permissible to subject anyone to coercion to make him accept Islam, nor will anyone be heard to say that a member of his household was compelled to go out from it' and cites the verse: 'And if thy Lord had willed, all who are in the earth would have believed together' in corroboration of this position. Some of the exegetists of the Quran cite the opinion that this verse has been abrogated by other verses.¹⁴⁸ S A Rehman regrets that 'attempts made by Muslims scholars themselves to whittle down its broad humanistic meaning by imposing limitations on its scope, dictated by exigencies of theological controversies that arose in the course of our history'.¹⁴⁹

Another verse of the Quran explains: 'And say, the truth is from your Lord, so whoever wills let him believe; and whoever wills - let him disbelieve'.¹⁵⁰ The Prophet is enjoined not to worry his soul out in grief, for those who turn away. He is forbidden to force them to the straight path, for this would interfere with the Divine Scheme of life here being a trial for the human soul. It is repeatedly emphasized that the duty of the Prophet is to convey the message fully and leave the rest to God. The *Din* is to be established by goodly exhortation and not by threat of force.

In the Indian subcontinent, the Muslims scholars Allama Iqbal and Syed Amir Ali highlighted the status of rationalism and intellectual liberty in Islam. Syed Amir Ali says that the vicegerent of Mohammad assisted in the growth of free thought and free inquiry originated and consecrated by the Prophet himself and persecution for the sake of faith was unknown'.¹⁵¹ During the Muslims Rule in India, the *Hedaya* was the chief source of guidance for working of the Court. According to the *Hedaya*, 'any person killing an apostate is himself immune to prosecution or retaliation. In addition, the apostate loses all civil entitlements. His marriage becomes a nullity and no right to inherit'.¹⁵² Muhammad Iqbal, one of the greatest poets of the sub-continent, spiritual father of Pakistan, criticized the standard working of the Indian Judges relating to

¹⁴⁷ Muhammad Abduh and Muhammad Rashid Rida, *Tafsir al-Quran al-Hakim-Tafsir al-Manar* (Cairo: Matba'at al-Manar, 1931).

¹⁴⁸ Siddiq Hassan Khan, *Fath al-Bayan fi Maqasid al-Quran* Vol.I (Cairo: Maktabat al-Asimah, 1303 A.H), p.426; Abi Bakr Ibn al-Arabi, *Ahkam al Quran*, part1, p.232.

¹⁴⁹ S. A. Rehman, *Punishment of Apostasy in Islam* (Lahore: Institute of Islamic Culture, 1972), p.16

¹⁵⁰ al-Quran, Surah Al-Kahf, 18:29.

¹⁵¹ Syed Amir Ali, *The Spirit of Islam: A History the Evolution and Ideal of Islam with a life of the Prophet* (London: Christophers, 1922), p.398.

¹⁵² Burhan ad-Din Ali, *The Hedaya, or guide; a commentary on the Mussulman Laws: translated by order of the Governor-General and council of Bengal, by Charles Hamilton* (London: T. Bensley, 1791), p.227.

apostasy in light of Hedaya and he questioned that this rule ‘tended to protect the interest of the Faith in this country’.¹⁵³

Apostasy is not a *Hudood* crime nor a capital offence in Pakistan. Pakistan still has no formal law prohibiting apostasy but blasphemy serves as a surrogate in suppressing those who dissent from Islam by word or deed.¹⁵⁴ Section 295C relates to derogatory remarks in respect of the Prophet Muhammad. (The blasphemy has been discussed in another part of the dissertation).

6.5 Capital offences under Qisas Crimes

The second category of crimes under the sharia deals with homicide and bodily hurt. In Islamic Criminal Law, *qisas* and *diyat* are also known as *al-jinayat* (literal meaning offences) and refer to homicide, bodily harm and damage to property.¹⁵⁵ The Quran enumerates two kinds of homicides and differentiates them on the basis of perpetrator’s intent: deliberate or willful (*amad*) and accidental (*khata*).¹⁵⁶ The Quran prescribes capital punishment for the offence of pre-meditated murder but it does elucidate the procedure how to determine the intent of the murderer. The Islamic Jurists has defined both mental and physical element of willful murder.¹⁵⁷ The question how to establish the element of *mens rea*(intention) is a matter of debate between different Muslims jurists and school of thoughts.¹⁵⁸

In relation to the question of the juridical nature of these offences, we need to only quote verses 2:178-179 of the Quran:

¹⁵³ Sir Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934), pp.160-161; The law of Islam, says the great Spanish Jurist Imam Shatibi in his *Al Muwafqat*, aims at protecting five things-Din (religion), Nafs, Aql(wisdom), Mal(wealth), and Nasal(offspring). Any person killing an apostate is himself immune to prosecution or retaliation

¹⁵⁴ David F. Forte, ‘Apostasy and Blasphemy in Pakistan’ (1995) 10 *Connecticut Journal of International Law* 27, pp.27-68, p.38.

¹⁵⁵ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon, 1964), p.181.

¹⁵⁶ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the twenty First Century* (Cambridge: Cambridge University Press, 2005), p.43.

¹⁵⁷ Dr. Ebrahim Ghodsi, ‘Murder in the Criminal Law of Iran and Islam’ (2004) 68 *Journal of Criminal Law*, pp.160-169, p.160.

¹⁵⁸ The Hanafites Abu Hanifa (d.767) limits intentional murder to the use of a weapon or of a thing that causes death. He identifies killing by all other weapons and instruments (hitting with a blunt instrument such as a stick or a large stone, drowning or poisoning) as semi-intentional. But Imam Yousaf(d.798) and Imam Muhammad disagree with Imam Abu Hanifa and they have adopted the view of Imam Shafi i and Imam Ahmad that a murder with anything which is generally fatal will be considered intentional murder. The Malikites and Shiites try to establish whether or not the intention to kill or wound existed by looking at other circumstances such as anger or hatred on the part of the offender.

O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.¹⁵⁹

This verse prescribes the punishment of Qisas for the offence of homicide. The Arabic word *qisas* denotes equality, analogy, and equity.¹⁶⁰ It is translated as retaliation¹⁶¹ or equality.¹⁶² Asad translates it as 'synonymous with *musawah*, i.e., making a thing equal, making the punishment equal to the crime- 'just retribution'.¹⁶³ In the opinion of Hallaq, *Qisas* is not exclusively an act of revenge but 'the considered and measured equalization (supervised, in all cases, by the Qadi) of loss of either limb or life'.¹⁶⁴

Another important constituent of the verse: 'The free for the free, the slave for the slave, the woman for the woman'. It means 'whatever the status of the guilty person, he or she is to be punished in a manner appropriate to the crime'.¹⁶⁵ The punishment is without gender and social status- 'no matter whether he was high born or low born, man or woman, free man or slave, Muslim or non-Muslim(*dhimmi*)'.¹⁶⁶ Dr Mahmood Ghazi elucidates that Islam advocates equality in punishment without discriminating between gender and social status- even the ruler is not exempted from the qisas.¹⁶⁷ The application of Islamic criminal law embraced all humans, regardless of their status or role, whether they were members of the ruling elite or part of the ruled class.¹⁶⁸ Ghulam Ahmad Prevaiz says that this verse maintains the basic principles of

¹⁵⁹ Al-Quran, Surah Al Baqara, 2:178.

¹⁶⁰ Mohammad Ibn Ibrahim Al-Hewesh, 'Murder and Homicide in Islamic Law: Textual Foundations' in Tahir Mahmood et al, (eds.) *Criminal Law in Islam and the Muslim World: A comparative Perspective* (New Delhi: Institute of Objective Studies, 1996), pp-151-163, p.156.

¹⁶¹ Mamaduke Pickthall, *The Meaning of the Glorious Quran: An Explanatory Translation*, London, 1930.

¹⁶² Yousaf Ali, *The Meaning of the Holy Quran*, pp.71-2

¹⁶³ Muhammad Asad, *The Message of the Quran* (Gibraltar: Dar Al-Andalus, 1980), p.37

¹⁶⁴ Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), p.310.

¹⁶⁵ Muhammad Asad, *The Message of the Quran* (Gibraltar: Dar Al-Andalus, 1980), p.37

¹⁶⁶ M. Hadi Hussain, *Imam Abu Hanifa: Life and Work, English Translation of Allamah Shibli Nu'mani's 'Sirat-i-Nu'Man* (Lahore: Institute of Islamic Culture, 1972), p.217

¹⁶⁷ Dr. Mahmood Ahmad Ghazi, *Qanun-e-Qisas and Diyat (Draft)* (Islamabad: Idara Tahqiq-e-Islami, 1986), p.58.

¹⁶⁸ Mahgoub El-Tigani Mahmoud, *Criminology and Penology in Islamic Jurisprudence* (Lewiston: The Edwin Mellen Press, 2015), p.140.

justice and equity ‘no distinction should be made between the great and the humble, what is to be considered is not the status of the person murdered or the murderer, but the principle of justice according to which life is equally valuable’.¹⁶⁹

The verse does not explicitly explain what would happen when a free man murders a slave or vice versa, or what course should be adopted if a man slays a woman or vice versa. Anderson states that some of the early jurists of Islam were of the opinion that a man could not be killed in *qisas* for killing a woman.¹⁷⁰ The verse also does not clarify if a free man can be murdered for killing a slave and different jurists made their different opinion.¹⁷¹ Hadi Hussain explains that ‘the Quranic text provides no justification for this kind of inhuman discrimination’.¹⁷² Such kind of interpretation is not acceptable to the followers of Islam because they are inconsistent with the widely recognized commands of the Quran and the Sunnah.¹⁷³ Cherif Bassiouni asserts that the ‘principle of every individual’ equal before the law is an extension of the general proposition in Islam that all are equal’.¹⁷⁴

Moreover the verse 179 states: ‘The law of equality there is (saving of) life to you, o ye men of understanding; that ye may restrain yourselves’.¹⁷⁵ Al-Tabari explained that *qisas* laws were revealed to reform the pre-Islamic culture of revenge. A famous commentary on the Quran explains: what this means is that there is preservation of life for others [i.e. innocent members of the family or tribe] in *qisas* since no one else other than the killer should be killed according to God’s decision.¹⁷⁶ Al-Tabari goes on to explain that this verse was in response to pre-Islamic tribal laws where the innocent could be killed for crimes committed by members of their families or tribes. Anderson has said that the obligation of vengeance was inbred in the Arabs.¹⁷⁷ Thus,

¹⁶⁹ Ghulam Ahmad Pervaiz, *Maarif-ul-Quran*, vol.4,1979, p.32.

¹⁷⁰ James Anderson ND, ‘Homicide in Islamic law’ (1951) 13(4) *Bulletin of the School of Oriental and African Studies* 81, pp.811-828, p.815.

¹⁷¹ Imam Abu Hanifa ruled that a free man may be killed in retaliation for a slave. Imams Shafi Malik, and Hanbal differs with the opinion.

¹⁷² M. Hadi Hussain, *Imam Abu Hanifa: Life and Work, English Translation of Allamah Shibli Nu'mani's 'Sirat-i-Nu'Man'* (Lahore, Institute of Islamic Culture, 1972), p.218.

¹⁷³ The Prophet in his last sermon said “An Arab has no superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab; a white has no superiority over a black, nor does a black have any superiority over a white; except by piety and good action”.

¹⁷⁴ M. Cherif Bassiouni, *The Shari'a And Islamic Criminal Justice in Time of War and Peace* (Cambridge: Cambridge University Press, 2014), p.129.

¹⁷⁵ Al-Quran, Surah Al-Bqra, 2:179.

¹⁷⁶ Muhammad ibn Jarir al-Tabari, *Tafsir al-Tabari: Jami al Bayan fi Tawil al Quran*, Sura Al-Baqara.

¹⁷⁷ James Anderson ND, ‘Homicide in Islamic law’ (1951) 13(4) *Bulletin of the School of Oriental and African Studies* 8, pp.811-828, p.815.

the *qisas* was intended to limit the vicious blood feuds that Arab tribes would pursue with great fervor, sometimes from generation to generation. Islam forbade the traditions of revenge and vendetta to be replaced by an equity *qisas* on all humans.¹⁷⁸ Peters reckons that ‘most important reforms were that revenge in kind could only be taken on the person of the offender and only after due trial’.¹⁷⁹ Salim al-Awwa explained: *Qisa* (retribution) is permitted due legal process but not the victims to do it themselves.¹⁸⁰

Emphasis is on Forgiveness

Although the Quran very clearly makes provisions for the death penalty a punishment for an offence of premeditated murder under the principle ‘an eye for an eye’ it also makes provision for an alternative course of action through victim forgiveness and restitution. The verse of the Quran that bears the command of *qisas* ends with stress being placed on forgiveness. The settlement should be made ‘in a goodly manner’ and compensation ‘handed over generously’, pointing out to the two parties and to the whole community that ‘this is an alleviation and mercy from your lord’.¹⁸¹ Haleem argues: ‘In this section the words *ufiyya*(pardoned) and *akhi*(his brother), *bi'l-ma'ruf* (in a fair way) and *b-ihsan* (in a good way) are calming words that call for magnanimity and generosity on all sides’.¹⁸² The heir or heirs of the victim in an intentional murder can pardon the punishment of *qisas* of the convict either against *diyat* or without accepting any compensation.¹⁸³

The majority of Muslims jurists argue that the Quran and Sunnah permit to forgo the *qisas* punishment and to adopt alternative forms of punishment. The victim (heirs in case of murder) have a ‘right to forfeit the claim to physical retaliation’ and resort to settlement.¹⁸⁴ To derive the law of *qisas* and *diyat* in the case of intentional murder the Muslims jurist have corroborated their stance that the Quran always suggests

¹⁷⁸ Knut Vikor, *Between God and the Sultan: A History of Islamic Law* (London: Hurst and Company, 2005), p.288.

¹⁷⁹ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty first Century* (Cambridge: Cambridge University Press,2005), p.40.

¹⁸⁰ Muhammad Salim al-Awwa, *Fi Usul al-Nizam al-Jina i al-Islami*, 2nd ed(Cairo, Daral Ma'rifah,1979),p.254.

¹⁸¹ Mohammad Abdel Haleem, ‘Compensation of Homicide in Islamic Shari’a’: in Mohammad Abdel Haleem, Adel Omar Serif and Kate Daniels (eds.), *Criminal Justice in Islam: Judicial Procedure in the Sharia* (London: I. B. Tauris, 2003), pp.97-108, p.99.

¹⁸² Ibid, p.99

¹⁸³ Dr. Pro. Anwarullah, *The Criminal Law of Islam* (Islamabad: Shariah Academy, 2004), p.94.

¹⁸⁴ Knut Vikor, *Between God and the Sultan: A History of Islamic Law* (London: Hurst and Company, 2005), p.288.

pardon and compensation with Qisas. 'And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers'.¹⁸⁵ The Quran encourages the victim's family to pardon the offender. 'And the retribution for an evil act is an evil one like it, but whoever pardons and makes reconciliation - his reward is [due] from Allah. Indeed, He does not like wrongdoers'.¹⁸⁶ 'And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed. But if you are patient - it is better for those who are patient'.¹⁸⁷ These verses conclude with the preferred option namely forgiveness by the victim, and of course the heirs of the victim.¹⁸⁸ The Quran permits to take retaliation who are injured but it also reminds that 'it is better to forgive and seek reconciliation'.¹⁸⁹

It is pertinent to mention here that 'compensation is an option, and that both parties, heirs and murderer, must agree to it'.¹⁹⁰ The compounding of the offence should be voluntary and without any element of coercion or pressure of any kind. To facilitate reconciliation, compensation is always accompanied by an admission of guilt or assumption of responsibility, apology, and request for forgiveness by the perpetrator'.¹⁹¹

As a policy matter, compensation is encouraged over retaliation as a way of breaking the cycle of violence, and of bringing about reconciliation between the victim and the perpetrator.¹⁹² Vikor explains a civilizational intent behind this rule that 'early legislators did not aim to abolish the idea of lex talions or blood revenge outright'.¹⁹³ He further elaborates that the 'intention behind making the victims choose between

¹⁸⁵ Al-Quran, Surah Al-Maidah, 5:45.

¹⁸⁶ Al-Quran, Surah Ash-Shura, 42:40.

¹⁸⁷ Al-Quran, Surah An-Nahal, 16:126.

¹⁸⁸ M. Cheriff Bassiouni, Death as a Penalty in Sharia in Peter Hodgkinson and William A. Schabas (eds.), *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), pp.169-185, p.182.

¹⁸⁹ Hasan Gai Eaton, *The Concept of Justice* (London: The Book Foundation, 2004), p.4.

¹⁹⁰ Mohammad Abdel Haleem, 'Compensation of Homicide in Islamic Shari'a' in Mohammad Abdel Haleem, Adel Omar Serif and Kate Daniels (eds.), *Criminal Justice in Islam: Judicial Procedure in the Sharia* (London: I. B. Tauris, 2003), pp.97-108, p.100.

¹⁹¹ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), p.139.

¹⁹² Ibid, p.139.

¹⁹³ Knut Vikor, *Between God and the Sultan: A History of Islamic Law* (London: Hurst and Company, 2005), p.288.

revenge and compensation was clearly to direct the victims towards the less severe punishment'.¹⁹⁴ Dr Tahir ul Qadri says: 'The punishment of blood money possesses the restituted character'.¹⁹⁵ Abd Allah Yousuf Ali maintains: 'If the aggrieved party consents forgiveness and brotherly love is better and the door of mercy is kept open'.¹⁹⁶ The significance of this option is that 'it saves life'.¹⁹⁷ God wants to promote life as well as justice, which are promoted through qisas as well as forgiveness. The system of victim forgiveness and restitution means of achieving justice without losing another life.

On top of it, the principle of mitigating the Sharia penalties works. Dr. Tahir ul-Qadri explains: 'A system of preconditions and prerequisites for the imposition of Islamic punishments, relating to substantive as well as to procedural penal laws, has been formulated to check the frequent application of severe punishments'.¹⁹⁸ In this regard, principles and techniques of avoidance of huddod and Qisas penalties are par excellence. The tradition of Prophet says: 'Avoid *budud*[punishments] whenever you find an opportunity to do so' 'if there is an exculpating cause for then release him as it is better that the imam makes a mistake in pardoning than in punishing'.¹⁹⁹ From the earliest periods in Islamic history, the very real specter of unjustified and excessive punishment rankled Muslim jurists.²⁰⁰ The harshness and irrevocability of these punishments-especially in the capital context- prompted jurists to find means to avoid punishment, lest they be responsible for the consequences of getting it wrong.²⁰¹ The *raison d'être* is to reinforce principle that to pardon a criminal is better than to punish an innocent person.

¹⁹⁴ Ibid, p. 288.

¹⁹⁵ Muhammad Tahir-ul-Qadri, *Islamic Philosophy of Punishments* (Lahore: Minhaj-ul-Quran Publications, 1985), p.16.

¹⁹⁶ Abudullah Yusuf Ali, *The Meaning of Holy Quran 'English Translation and Commentary of the Holy Qu'ran*, p.70.

¹⁹⁷ Mohammad Abdel Haleem, 'Compensation of Homicide in Islamic Shari'a' in Mohammad Abdel Haleem, Adel Omar Serif and Kate Daniels (eds.), *Criminal Justice in Islam: Judicial Procedure in the Sharia* (London: I.B Tauris, 2003), pp.97-108, p.100.

¹⁹⁸ Muhammad Tahir-ul-Qadri, *Islamic Philosophy of Punishment* (Lahore: Minhaj-ul-Quran Publications, 1985), p.35.

¹⁹⁹ Sunan Ibn Majah, (1998), 4:161, no.2545; for English translation see Muhammad b. Yazeed et al, ed. And trans., *English Translation of Sunan Ibn Majah* (Riyadh: Dar al-Salam, 2007).

²⁰⁰ Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015), p.38.

²⁰¹ Ibid, pp.37-38.

Abdur Rahim underlines that ‘any doubt would be sufficient to prevent the imposition of hadd’.²⁰² In this context, Rahim reckons two aspects of doubt: First even if the accused himself did not entertain any doubt on the point this is called error or doubt with respect to subject of the application of law (shubhatul-mahal).²⁰³ Secondly, the doubt and error with respect to the act (shubhat-ul- fa’il).²⁰⁴ It connotes that if the case is not proved beyond reasonable doubt, the court should find in favor of the defendant. This equates to the established legal maxim ‘presumption of innocence’ which is a key element of the right to fair trial under article 14(2) of the International Covenant on Civil and Political Rights.²⁰⁵ ‘It is a well-established principle in qisas crimes that circumstantial evidence favorable to the accused to be relied on, but unfavorable evidence is to be disregarded’.²⁰⁶ Moreover, the prerequisite of the high standard of proof (at least two witness) to prove the guilt under the Shariah equates to Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty approved by Economic and Social Council in 1984.²⁰⁷

6.6 Analysis of Pakistani law of Qisas and Diyat in light of concept of Justice under Quran and Sunnah

6.6.1 Emergence of Qisas and Diyat Law in Pakistan

This law was promulgated to bring the existing penal laws of Pakistan dealing with homicide and body hurt in conformity with the Quran and the Sunnah in the light of three judgments²⁰⁸ of three Shariat courts namely the Shariat Bench of Peshawar High Court, Federal Shariat Court and finally the Sharait Appellate Bench of the Supreme Court.²⁰⁹ As a part of the Islamization process (Nizam-e- Mustafa), the President of

²⁰² Abdur Rahim, *The Principles of Muhammadan Jurisprudence: According to The Hanafi, Maliki, Shafi'i and Hanbali Schools* (London: Luzac & Co, 1911), p. 362.

²⁰³ Ibid, p. 362.

²⁰⁴ Ibid, p. 362.

²⁰⁵ Mohammad Habbash & Michael Mumisa, *Sharia Law and the Death Penalty: Would Abolition of the Death Penalty be Unfaithful to the Message of Islam* (London: Penal Reform International, 2015), p.12.

²⁰⁶ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), p.129.

²⁰⁷ Mohammad Habbash & Michael Mumisa, *Sharia Law and the Death Penalty: Would abolition of the Death Penalty be Unfaithful to the Message of Islam* (London: Penal Reform International, 2015), p.12.

²⁰⁸ *Gul Hassan Khan v. the Government of Pakistan*, PLD1980 Peshawar1; *Muhammad Riaz etc. v. The Federal Government of Pakistan*, PLD 1980 FSC 1 and *The Federation of Pakistan v. Gul Hassan Khan*, PLD 1989 SC 633.

²⁰⁹ Martin Lau, *The Role of Islam in Legal System of Pakistan* (Leiden: Martinus Nijhoff, 2006), pp-137,193.

Pakistan established the Federal Shariat Court to review laws of Pakistan for repugnancy to Islam.²¹⁰ The Shariat Court hierarchy included local benches as well as a Federal Shariat Court (FSC) subject only to the review of the Supreme Court. In exercise of powers conferred by the constitution,²¹¹ these courts could, upon finding a law un-Islamic, require the government to amend the law. It is a judge-led process of Islamization executed by the *Shariat* court of the country.²¹²

This law was enacted without developing any consensus among the ‘executive, judiciary and members of the Parliament that ‘had different approaches to the application of Islamic criminal law’.²¹³ The law relating to qisas and diyat was introduced first as an ordinance in 1990. It is pertinent to mention that two different Assemblies debated the draft law of homicide and body hurt on 23 July, 1984²¹⁴ and 1993²¹⁵ respectively but the law could not become legislation. On April 7, 1997, the Bill was tabled in the National Assembly through a motion.²¹⁶ The law was passed by the Parliament within 30 minutes in April 1997 by violating the rules of assembly including handing over a bill to a standing committee, select committee for discussion and debate, and the prior notice to members of parliament.²¹⁷ Syed Naveed Qamar raised the objection regarding the abrupt introduction of the law: ‘36 page law and you (speaker) want to pass it in five minutes and you do not want to send it to Committee’.²¹⁸ The opposition walked out.²¹⁹ No discussion or debate took place whatsoever about a law which had been deliberated by at least ten committees and on which no consensus had emerged in three successive Assemblies.²²⁰

²¹⁰ Presidential order No 1, 1980, The Constitution of Islamic Republic of Pakistan 1973, Article 203 D(1).

²¹¹ Chapter 3-A which pertains to the functions and organization of Federal Shariat Court, empowers the court and entrusts the court with the responsibility to examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Qur’an and the Sunnah of the Holy Prophet.

²¹² Martin Lau (n 209), p.1.

²¹³ Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Leiden: Brill, 2009), p.99.

²¹⁴ Debates of the Federal Council, 26 July 1984;

²¹⁵ National Assembly Debates, vol.2, no.6, (Islamabad: 10th June, 1993), p.606.

²¹⁶ National Assembly Debate, 1997, vol.4, no.7, Islamabad, p.577.

²¹⁷ National Assembly Debate, 1997, vol.4, no.7, Islamabad, p.578.

²¹⁸ National Assembly Debate, 1997, vol.4, no.7, Islamabad, p.578.

²¹⁹ The National Assembly of Pakistan, Debates: official Report Volume IV, No.7 (Islamabad: National Assembly, 7th April, 1997), p.585.

²²⁰ Tahir Wasti (n 213), p.162.

Tahir Wasti argues that the Qisas and Diyat Law in Pakistan was enforced on the basis of ‘political expediencies without deep study, an analytical approach, organized research, and contemporary thinking’.²²¹ The law was passed in perfunctory manner that shows the primary motive was to pay lip service to Islam by simply adopting a law that was issued in its name. As the Lahore High Court observed in *Abid Hussain v. The State* that law ‘injected into our pre-existing criminal law and legal system without any serious debate or deliberations’.²²²

6.6.2. Power of Legal Heir to Pardon off Promotes Unequal Justice

This law brought drastic changes in Chapter 16 of the British-era Pakistan Penal Code 1860 from sections 229 to 338 related to bodily hurt and murder.²²³ Section 338-E under the Pakistan Penal Code (PPC) states that all offences under Chapter 16 of the Pakistan Penal Code (i.e. offences affecting the human body) can be waived or compounded in the matter provided in sections 309²²⁴ (i.e. a sane adult legal heir can waive his right of Qisas in murder without compensation) and 310 which provide compounding of Qisas on accepting *badl-i-sulh* (i.e. compensation), subject to the provisions of Section 345 of the Criminal Procedure Code. i.e. with the permission of the court and only by the persons mentioned in the schedule. Wali, an adult and sane legal heir, was allowed to compound his right of qisas at any time by accepting *badl-i-sulh* (exchange of compromise).²²⁵ *Badle-i-Sulh* was explained as mutually agreed compensation according to Shariah to be paid or given by the offender to wali in cash or kind in the form of moveable, or immovable property.²²⁶

Firstly the right of the *wali* to compound Qisas at any stage of the trial has not helped to promote unequal justice but has had an impact on the process of investigation and trial. In addition, Qisa and Diyat Law ‘does not provide any guidelines to courts about how to ensure that the compromise between the parties is genuine or false’.²²⁷ Consequently, the process of compromise resulted in coercion and corruption. Both the Shariat Bench of Peshawar High Court²²⁸ and the Federal Shariat Court²²⁹ did not

²²¹ Ibid, p.97.

²²² *Abid Hussain v. The State*, PLD 2002 Lahore 482.

²²³ Criminal law (Second Amendment) Qisas and Diyat Law, 1997,

²²⁴ Criminal Law (Second Amendment), 1997, The Qisas and Diyat Law, section 309.

²²⁵ Ibid, sec. 310.

²²⁶ Ibid, sec. 310

²²⁷ Tahir Wasti (n 213) p.207.

²²⁸ *Gul Hassan Khan v. The Government of Pakistan*, PLD1980 FSC 187

²²⁹ *Mohammad Riaz v. The Federal Government*, PLD1980, FSC187.

rule out the possibility of frightening the heirs of the deceased person to accept compromise and the Federal Shariat Court suggested that the courts should monitor the settlement process in order to ensure ‘the question of deciding upon the genuineness of a compromise and permitting composition in a case of retaliation should be vested in the High Court’.²³⁰ The perusal of Assembly debate on the law reflects that many members of the Assembly had shown their concern regarding the viability of the law. In this regard, Syed Zafar Ali Shah a member of opposition depicted the sorry states of affairs during the debate of Parliament in 1993 in these words: ‘Now a days a man kills another and then threatens his heirs that if they did not pardon him then he would kill them too. Because of these threats, people were pardoning murderers’.²³¹ The Lahore High Court in *Ghulam Shabir v. Mst. Zani Bibi*²³² the court acknowledged the tactics that those accused use to take advantage of the heirs of the deceased. It was observed:

In many cases the poor and helpless heirs of a deceased [person] cannot withstand the pressure tactics of the influential accused persons and finally submit to their demands even after the accused have exhausted all the remedies under the law. This is mostly done out of the fear of the accused and not of their own free will to pardon them in the name of God.

In the recent past, the two most widely reported cases have unfurled how the powerful and the rich exploit the law. The swift release of the American Central Intelligence Agency (CIA) contractor Raymond Davis left behind many doubts and questions regarding the settlement of the double-murder case. The victims’ families’ counsel Asad Manzoor Butt has alleged that the government forced the families to accept diyat.²³³ Another case that gained lime light in the media that Anti-terrorism Court (ATC) had awarded death sentences to Shahrukh Jatoi and Siraj Talpur, the key suspects, in Shahzeb murder case in June 2013. The case become a test for the criminal justice system as the Jatoi, who is the son of a billionaire and a very influential man, got the legal heir of the slain Khan to forgive the murder under the Islamic provision of the criminal laws. The legal heirs of (murdered) Khan could not sustain the pressure and influence and eventually submitted an affidavit of forgiveness of their son’s murder.

²³⁰ Muhammad Riaz, PLD 1980 FSC 30.

²³¹ National Assembly Debate, Vol.2, no.6.1993, p.614.

²³² Ghulam Shabir v. Mst. Zani Bibi, 1999 MLD 585.

²³³ .BBC <<http://www.bbc.co.uk/news/world-south-asia-12757244>> accessed on April20, 2016.

The Supreme Court, executive of the country and reports of government commissions have underlined the need to reform the law. On October 03, 2013, the Supreme Court decided to constitute a five-judge bench to take up matters concerning the misuse of compromise laws and Islamic injunctions to get those convicted of heinous cases pardoned in the name of God. The Prime Minister's special assistant on legal affairs said: 'This abuse was to the degree that influential and rich people would get away with murder, literally'.²³⁴ The principles of justice require that the wali / state be allowed to exercise its option or the legal heirs of victims be allowed to compound the offence after the completion of the trial. The report of the National Commission on the Status of Women reflect that qisas be compounded only subject to completion of the following procedure: 'Firstly, the crime is proved either by confession or by evidence; secondly, the convict must submit his or her written apology to the legal heirs of the victims through the court'.²³⁵

6.6.3. Discrimination Against Women

Most importantly, the Qisas and Diyat Law implicitly condones honor killing. Before the introduction of the Qisas and Diyat law the Indian Penal Code 1860 allowed 'grave and sudden provocation to serve as mitigating factors in the adjudications of these crimes. In the *Gul Hassan Case v. Federation of Pakistan*, the court stated: 'According to the injunctions of Islam, provocation, no matter how grave and sudden it is, does not lessen the intensity of crime of murder'.²³⁶ The plea of provocation was argued and accepted in the courts in mitigation even though the provision as such no longer exists in law.²³⁷ In this regard, the judges invoked section 338F that empowers a vast discretionary authority to the judiciary to interpret and apply the law in accordance with the injunctions of Islam.²³⁸ But unfortunately 'neither the parameters for interpreting the Islamic injunctions had been laid down nor were the judiciary sensitized on human rights and trained in Shariah law'.²³⁹

²³⁴ The Daily Dawn , November 19,2015 <<http://www.dawn.com/news/1220808>> assessed on April 11, 2017.

²³⁵ National Commission on the Status of Women(NCSW) &UNDP, *The Concept of Justice in Islam: Qisas and Diyat Law* (Islamabad: NCSW,2006), pp-100-101.

²³⁶ *Gul Hasan Khan v. Government of Pakistan*, PLD1980, FSC 187, p.674

²³⁷ Sohail Akbar Warriach, Honor Killings' and the Law in Pakistan in Lynn Welchman and Sara Hossain (eds.), *Honour: Crimes, Paradigms, And Violence Against Women* (London: Zed Books,2005), pp.78-110. p.96.

²³⁸ Criminal Law(Amendment) Act 1997, The Qisas and Diyat Law, section 338-F

²³⁹ Tahir Wasti (n 213), p.194.

Against this backdrop, the judiciary made its own interpretation of Sharia to apply the law. In *Ghulam Yasin and 2 Others Vs. the State*, the court exercised the powers under article 338F and made distinction of murder committed with intention (Qatl-e-Amd) from the murder committed on account of honor.²⁴⁰ The court noted that ‘the persons found guilty of murder (Qatl) committed on account of honor do deserve concession which must be given to them.’²⁴¹ In *Gulam Hussain alias Hussain Bakhsh*’ case the Supreme Court upheld the plea of grave and sudden provocation.²⁴² The Lahore High Court in *Muhammad Rafique v. the State* gave the benefit of sudden provocation the accused, who killed his wife, on the ground that he followed well established social norms.²⁴³ In *State v. Abdul Waheed and another*, the Supreme Court Appellate Bench examined section 302(a) and (c) PPC and held that a *Qatl-e-Amd* (premeditated murder) by husband will attract a punishment lesser than Qisas.²⁴⁴ In the *State v. Muhammad Hanif* case, the Supreme Court held that the husband ‘as custodian of honor of his wife had the right to kill the deceased while he was engaged in sexual act with his wife and he had not earned liability of Qisas or Tazir or even Diyat’.²⁴⁵ In *Sardar Muhammad v. The State*²⁴⁶, the Lahore High Court declared such murders not to be an offence at all and acquitted an accused of murdering two persons his daughter and partner in the sugarcane field.

Since 1999 the judiciary in Pakistan has adopted an opposing stance in a series of judgments.²⁴⁷ The Lahore High Court in *Muhammad Siddique vs. The State*²⁴⁸ proactively used its discretionary powers under s.338-E PPC in the case, involving a man who had killed his daughter, the husband of the daughter and their child, to confirm the trial court’s death sentence despite the fact that compromise had been reached during the proceedings. In *Muhammad Akram Khan v. The State* in 2001, the Court held that honor killings are murders and violate ‘fundamental rights as enshrined in Article 9 of the constitution of Islamic Republic of Pakistan, which

²⁴⁰ *Ghulam Yasin and 2 Others v. The Sate*, PLD 1994 Lah.392.

²⁴¹ *Ibid*, p. 397.

²⁴² *Ghulam Hussain alias Hussain Bakhsh Vs. The State and another*, PLD 1994 SC 31

²⁴³ *Muhammad Rafique vs. the Sate*, PLD 1993 Lahore 848

²⁴⁴ *State v. Abdul Waheed and another*, 1992 P Cr L J 1596.

²⁴⁵ *The State v. Muhammad Hanif*, 1992 SCMR 2047.

²⁴⁶ 1997 MLD 3045, para 13, p.3049

²⁴⁷ Sohail Akbar Warriach, *Honor Killings’ and the Law in Pakistan* in Lynn Welchman and Sara Hossain (eds.), *Honour: Crimes, Paradigms, And Violence Against Women* (London: Zed Books, 2005), pp.78-110, p.96.

²⁴⁸ *Muhammad Siddique v. The State*, PLD2002 Lahore 444, p.454.

provides that ‘no person would be deprived of life and liberty except in accordance with law and any custom or usage in that respect is void under Article 8(1) of the Constitution.’²⁴⁹ In *Ashiq Hussain v. Abdul Hameed*, the Court held ‘no court could and no civilized human being should sanctify murders in the name of tradition, family honor or religion’.²⁵⁰ Similarly in *Muhammad Saleem* case wherein the Supreme Court held that ‘nobody had the legal or moral right to take the life of a human being in the disguise of ‘*Ghairat*’ (honour). Conviction and sentence of death had been rightly and lawfully recorded against the accused by way of *Tazir*’.²⁵¹

The provision of exception from the punishment of Qisas under the Qisas and Diyat Law 1997 gives protection to the perpetrators of honor crimes: Qisas cannot be applicable where murder(*qatl-i-amd*) is committed by a minor or insane person or in cases where the victim is a child or grandchild of the offender.²⁵² This clause saves perpetrators of honour crime to get away with the punishment of Qisas (retribution) because the killers are mostly the parents, siblings and other close relatives of the victims.²⁵³ Dr. Ghazi supports the exception (section 306) on the basis of fiqh(Juristic Interpretation): ‘Father being ‘*asl*’(original) can eliminate its extension(*Tauseeh*)i.e. child but vice versa is not possible’.²⁵⁴ According to some scholars, a father is a life giver hence the *Qisas* of his life cannot be taken upon killing his children. Dr. Tanzil ur- Rehman also supports the exception to the general rule of retaliation because ‘due to respect paid to a father in Islam’.²⁵⁵ There are judgments of courts that exempted the father for murder of their children. In *Faqir Ullah v. Khalil-uz-Zaman*²⁵⁶ *Khalil-uz-Zaman*²⁵⁷ and *Mohammad Rafique v. State*²⁵⁸ in which a wife was killed by her husband, the trial court awarded death penalty under section 302, Qisas and Diyat Law. But neither Dr. Tanzil –ur-Rehman nor courts in judgments cited herein above, have quoted *hadiths* (Traditions of the Prophet) to fortify their standpoints. In fact this exemption is neither mentioned in the Quran nor

²⁴⁹ *Muhammad Akram Khan v. The State*, 2001PLD SC 96, p.100.

²⁵⁰ *Ashiq Hussain v. Abdul Hamed*, 2002 PCr L. J J 859 (Lahore).

²⁵¹ *Muhammad Saleem v. State*, PLD 2002 SC 558

²⁵² Criminal Law(Amendment) Act 1997, the Qisas and Diyat Law, section 306.

²⁵³ Ghulam Hyder Sindhi, *Honour Killing and The Status of Women in Pakistan* (Islamabad: National Institute of Pakistan Studies, 2007), p.136.

²⁵⁴ Dr. Mahmood Ahmad Ghazi, *Qanun-e-Qisas and Diyat* (Draft) (Islamabad: Idara Tahqiq-e-Islami, 1986), p.63.

²⁵⁵ Dr. Tanzil -ur-Rehman, *Crime and Punishment in Islam*, PLD 1980, Journal 124.

²⁵⁶ *Faqir Ullah Vs. Khalil-uz-Zaman*, 2000 PSC(cr) 252.

²⁵⁷ *Khalil-Uz-Zaman Vs. Supreme Appellate Court, Lahore & 4 Others*, PLD 1994 SC 885

²⁵⁸ *Mohammad Rafique v. State*, 1993 PCrLJ 1403.

by the authentic hadiths. The exemptions under section 306 & 307 PPC is tantamount to giving a license to the Wali to kill the family members which is one of the causes of increase in the cases of honor killings.²⁵⁹

The Government of Pakistan has passed several amendments in efforts to end the discriminatory application of the Hudood Ordinance and resulting abuse of the Qisas and Diyat Law. In 2004, the amendment was introduced to counter honor crime in Pakistan. Critically, the Act does not address the crucial problem of statutory concession available to perpetrators through the Qisas and Diyat laws which posit forgiveness powers in the hands of victims and his or her legal heirs.²⁶⁰ When Qisas is inapplicable due to waiver, the court can invoke section 311 of the Pakistan Penal Code under the principle of *Fasad Fil- Ard* (serious disruption in society). However it is general court practice in Pakistan that once the heirs of the victim have waived their right to qisas, the court are hesitant to impose the a fore mentioned and the offender goes unpunished.²⁶¹

The tension between the empowerment of the victims and needs of the State has always engaged Islamic scholars. It is argued that 'the safety of the community may even require that the state retain the right to impose tazir in case of pardon or settlement'.²⁶² Dr Ghazi argues that it is the right of the state to punish the murderer to control law and order and to protect the right of society.²⁶³ Under the provision of *Fasad fil ard* the Law must distinguish those cases in which the state's intervention is necessary and those in which intervention constitutes an unacceptable usurpation of victim's rights.

The Pakistani version of the Qisas and Diyat Law discriminates against women and encourages unequal justice. The application of the law in the last twenty-five years catalyzed discriminatory cultural practices by placing the value of woman's life in the

²⁵⁹ National Commission on the Status of Women (NCSW) & UNDP, *The Concept of Justice in Islam: Qisas and Diyat Law* (Islamabad: NCSW, 2006), p.61.

²⁶⁰ Shilan Shah-Davis, 'A Woman Honour and a Nation's Shame: Honour Killing in Pakistan' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law* (Oxon: Routledge, 2011), pp.188- 200, p.196.

²⁶¹ Ghulam Hyder Sindhi, *Honour Killing and The Status of Women in Pakistan* (Islamabad: National Institute of Pakistan Studies, 2007), p.137.

²⁶² Gaafer Mohamed Abd-Elrahim, 'The Concept of Punishment in Islamic Law in Relation to Contemporary Legal Trends' (1990) 7(1) *American Journal of Islamic Social Sciences* 124.

²⁶³ Dr. Mahmood Ahmad Ghazi, *Qanun-e-Qisas and Diyat* (Draft) (Islamabad: Idara Tahqiq-e-Islami, 1986), p.64.

hands of her family members. In this context, the application of the Qisas and Diyat Law violates Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by reinforcing the discriminatory conception of women as disposable vessels of honour. The Law also violates article 15 of CEDAW that advocates for women's equal protection before the law.

In fact the law was grafted into the penal system without taking into account the social matrix of the society. The Hudood and Qisas ideal penalties were considered only by an ideal authority in egalitarian Muslim society. Abul Ala Maududi (1903-79) has rightly observed that an isolated provision of Islamic law cannot do any miracles without addressing the economics, social and political ills of the society.²⁶⁴ Salim el-Awa²⁶⁵ and Hashim Kamali also endorse Maududi's standpoint that the Islamic criminal Justice System in an alien environment is not only unrealistic but most likely to produce the opposite results- frustration with the Islamic vision of justice and fair play.²⁶⁶ Tariq Ramdan argues that 'The legal texts must be read in light of the objectives (*maqasid*) that justify them, first and foremost the protection of the integrity of the person (*nafas*) and the promotion of justice (*adl*). A literal and non-contextualized application of *hudud* without regard for the strictly stipulated conditions is a betrayal of the teachings of Islam, because it produces injustice',²⁶⁷

To sum up, the law has failed to promote equal justice without discrimination of gender and sex. It defeats the intent and purpose of justice as enunciated in the Quran. The application of the Qisas and Diyat Law in Pakistan is not only contrary to the domestic constitution but also the required ends of justice as enunciated in the Quran and the Sunnah. It has increased the arbitrariness of the application of capital punishment.

Conclusion

The principles and ideals of justice as enunciated by the Quran reflect the norms that have resonance in contemporary human rights standards. These ideals and principles

²⁶⁴ Abul Ala Maududi, *Islamic Law and its Introduction in Pakistan*, trans. Khurshid Ahmad (Lahore: Islamic Publications Limited, 1970), pp. 19-20.

²⁶⁵ Mohamad Selim el-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982) p. 136.

²⁶⁶ Muhammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of The Hudud Bill of Kelantan, Malaysia, (1998) 13(3) *Arab Law Quarterly* 203, pp. 203-234, p. 229.

²⁶⁷ Tariq Ramdan, 'A Call for a Moratorium on Corporal Punishment: The Debate in Review' in Kari Vogt, Lena Larsen and Christian Moe (eds.), *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (London: I.B Tauris, 2009), pp. 163-74, p. 166.

provide the basis for an ethical critique of penal laws practiced by the Muslims and their leaders. The Quran and the practice of the Prophet (P.B.U.H) attribute a paramount importance to right to life, presumption of innocence, repentance (*tawbah*) and reformation. The procedure adopted by the Prophet to implement punishments grants maximum benefit to the offender on the principle that to pardon a criminal is better than to punish an innocent person. The penalties prescribed in the Quran are not readily meant for random, arbitrary or spontaneous implementation.

The Quran as a divine book does not set forth a complete system of criminal justice. The legislative part of the Quran is the model illustration for future legislation and does not constitute a legal code by itself. The Muslims jurists of the sixth and the seventh century developed an Islamic criminal justice system and the classified punishments into *Hudoods*, *Qisas* and *Tazir*. Under the *Hudood* crimes, the early Muslim jurists categorized adultery and apostasy as capital offences. The legitimacy of capital punishment for these two offences may be seriously questioned because the punishment has not been prescribed by the Quran. In this context, the Quran prescribes punishment for adultery 100 lashes not stoned to death. The Quranic verses condemn apostasy but its punishment is restricted for divine justice in the hereafter. The Pakistan *Hudood* Ordinance prescribes the punishment of stone to death²⁶⁸ but it has been never implemented due to the stringent evidentiary requirements. Pakistan still has no formal law prohibiting apostasy but section 295C relates to derogatory remarks in respect of the Prophet Muhammad serves as a surrogate in suppressing those who dissent from Islam by word or deed. The capital punishment for offences related to sex and religion can be reviewed in the penal laws of Pakistan in line with the dictates of international guideline without violating the constitutional obligation to legislate in consistent with the Quran and Sunnah.

Under the *Qisas* crimes the offence of premeditated murder is liable to capital punishment. The Quran enumerates two kinds of murder and prescribes the punishment of death (*qisas*) for the offence of intentional murder. The Quran envisages the implementation of *Qisas* without any discrimination based on, gender and social position. The Quran categorically ordains that life cannot be taken under a system that does not fulfill all the required procedural guarantees including

²⁶⁸ Enforcement of Hudood Ordinance 1979, sec.17.

authenticity of evidence, the legality of pre-trial investigation, and provision of sufficient space for post-trial revisions.

The majority of Muslims jurists argue that the Quran and Sunnah permit to forgo the Qisas punishment and to adopt alternative forms of punishment, in this context, heirs of the victim in an intentional murder can pardon the punishment of Qisas of the convict either against *diyat* or without accepting any compensation. The Quranic verse that gives the command of *Qisas* concludes with the option of forgiveness and reconciliation. The underlying principle is to promote justice as well as life.

In 1990, Pakistan incorporated the Islamic law of murder and bodily hurt to bring the penal laws of the country in accordance with the Quran and Sunnah under the direction of the Shariat courts. The Pakistani version of the Qisas and Diyat Law was enforced on the basis of political expediencies without deep study, an analytical approach, organized research, and contemporary thinking and taking into account the social matrix of the society. Consequently, the law discriminates against women and encourages unequal justice. The law implicitly condones honour killings that are contradictory to tenants of Islam and spirit of the Constitution of Pakistan. The power of legal heirs to enter into compromise at any stage from investigation to the time of executions has not only marred the process of investigation but also gives an ample opportunity to the powerful and wealthy to frighten the legal heirs to enter into compromise.

In short, it is not against the tenants of the Quran and the Sunnah to restrict the scope of capital punishment in Pakistan in consonance with the most serious crimes under Article 6 of the International Covenant on Civil and Political Rights. The Quran categorically prescribes capital punishment for the offence of premeditated murder but at the same time condemns the killing of an innocent person. In addition to stringent evidentiary and procedural guarantees, the *hudood* and the *qisas* penalties are for ideal Muslims society ruled by the just rulers. In this backdrop, the application of capital punishment for the offence of pre-meditated murder both as a hadd or Tazir should be avoided due to the persistent occurrences of injustices in the society as a whole and inherent flaws in the criminal justice system in particular.

Chapter 7

The Death Row Phenomenon in India, Pakistan and Bangladesh: A Legal Challenge

Introduction

Death row phenomenon has become a legal challenge in India, Pakistan and Bangladesh due to the increase in death row prisoners each year, the pendency of cases in appellate courts and miserable living conditions in overcrowded prisons. According to Amnesty International Global Report, about 40 percent of the total death row population of the world is confined in overcrowded prisons of these three countries.¹ Especially in Pakistan, 7000 prisoners under sentence of death are confined in various prisons of the country. Law Commission Reports and judgments of the supreme courts of these countries help to study the legal and physical problems of prisoners under sentence of death. In addition to the interviews of death row prisoners recorded by different researchers, national and international NGOs reveal that miseries and horrors of life of those who are confined at death row. This chapter attempts to explore how the death row phenomenon is inhumane and degrading and indirectly undermines the legitimacy of capital punishment.

7.1. Defining Death Row Phenomenon

Hudson points out that there is no single definition of the death row phenomenon.² But it is generally known due to two main features: The long period spent in awaiting death; the second component involves harsh physical conditions. The third element is psychological. Some authors have used term 'death row syndrome' to describe the consequential psychological illness that can occur as a result of death row phenomenon. Smith identifies the cause of psychological harms due to 'extended

¹Amnesty International, *Death Sentences and Executions* 2015 (London: Amnesty International, 2016), p.7. During the year 2015, total number of the death row prisoners confined in different countries of the world, 20292, excluding China.

² Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' (2000) 11(4) *European Journal of International Law* 833, p.838.

periods of time spent on death row, in harsh conditions coupled with the unique stress of living under the sentence of death'.³

7.1.1. Death Row Phenomenon Portrayed by Different Authors in the World

The classical writers namely Camus, Foucault and Jeremy Bentham demonstrate in their works the experience of being on death row.⁴ They documented the nature and problems of being on death row; each of these classical works offers a glimpse of the wider social structures within which death row prisoners were positioned. Apart from these classical studies, there are numerous scholars who have documented this severe mental trauma, a result of the severe stress associated with death sentences.⁵ All these works show that all condemned prisoners suffer from an overwhelming sense of fear and helplessness, mental incompetence, fluctuating moods, recurrent depression, mental slowness, confusion, forgetfulness, lethargy, listlessness, drowsiness, symptom of senility, self-mutilation and insanity confined elsewhere in the prison.⁶ Some condemned prisoners grow old prematurely and describe themselves as 'the living dead' an image that conveys the extremity of their confinement'.⁷

It is a fact that waiting for death is more horrible than the death itself. George Scott has rightly said that 'the fear of death, during those tragic days, is productive of much greater suffering than the actual experience of death'.⁸ Albert Camus has portrayed the agony and suffering of death row prisoners in these words: 'Man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second'.⁹ Robert Jonson depicted: 'Defeated by the

³ Amy Smith, 'Not Waiving but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution' (2008) 17 *The Boston University Public Interest Law Journal* 237, p.242.

⁴ Albert Camus, *Reflections on the Guillotine* (Indiana: Fridtjof-Karla Publications, 1960); Michel Foucault, *Discipline and Punish*; Jeremy Bentham, *An Introduction to the Principles of Morals and legislation* (Collected works of Jeremy Bentham) (Oxford: Clarendon Press, 1996).

⁵ William Schabas, Development in Criminal Law and Criminal Justice: Execution Delayed Execution Denied' (1994) 5 *Criminal Law Forum* 180.; Michael Radelet, *Facing the Death Penalty: Essays on a Cruel and unusual Punishment* (Philadelphia: Temple University Press, 1990).

⁶ Robert Johnson, *Death Work: A Study of the Modern Execution Process* (Belmont CA: Wadsworth, 1998), pp-96-103; Michael Ross Death Penalty Cases' (2006) 14(2) *Journal of Law and Policy* 735.

⁷ Robert Johnson, Life Under Sentence of Death in Robert Johnson & Hans Toch (eds.), *The Pains of Imprisonment* (London: Sage, 1982), p. 129.

⁸ George Ryley Scott, *The History of Capital Punishment: Including an Examination of the Case for and against the Death Penalty* (London: Torchstream Books, 1950), p.124.

⁹ Albert Camus, *Resistance, Rebellion, and Death* (New York: A Knopf, 2012), p.205.

awesome prospect of death by execution. Worn down in small and almost imperceptible ways, the gradually but inexorably become less than fully human'.¹⁰

It does not only involve the delay but also often appalling conditions of detention imposed upon the inmates. William Schabas described harsh prison conditions: 'Cells without amenities, little or no time outdoors for recreation, and absence of activities related to work or education, contemptuous prison personnel, restricted opportunities for family visits'.¹¹ His life is lived twenty-three out of twenty-four hours a day in a space six feet wide and eight feet long.¹² The conditions of confinement also appear to aggravate existing mental disorder.¹³ It is the place where humanity is constantly denied. 'Here life and death are one. Both are ever present; while there are times when death seems distant, it is only an illusion'.¹⁴

Another bleak aspect of death row is segregation of condemned prisoners from the general population that makes prisoners feel degraded. In this context, C. Michael Lambrix (death row prisoner) explains: 'Part of this stems from physical constraints, while part stems from symbolic isolation that comes from living with the fact that 12 members of your community have determined that you are a worthless person who should no longer be permitted to exist'.¹⁵ 'Life on death row is a blending of the real and the unreal; it is a clash of internal and external tension, the tension of everyday living magnified a hundred times'.¹⁶ Robert Johnson says: 'the stress of life under sentence of death reaches its zenith during the deathwatch'.¹⁷

The reality of this waiting place for death is difficult to grasp. 'Death row is indeed, the stuff of poets, because so much of the suffering that is involved belongs to the

¹⁰ Robert Johnson, *Death Work: A Study of the Modern Execution Process* (Belmont, CA: Wadsworth, 1998), p.93.

¹¹ William A. Schabas, *Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in The World's Courts* (Boston: Northeastern University Press, 1996), p.96

¹² Helen Prejean, *Dead Man Walking* (London: Fount Paperbacks, 1993), p 16.

¹³ Cunningham, Mark D., and Mark P. Vigen, 'Death row inmate characteristics, Adjustment, and confinement: A critical review of the literature' (2002) (20) *Behavioral Sciences & the Law* 191.

¹⁴ Joseph M. Giarratano, 'The Pains of Life' in Michael L. Radelet(eds.), *Facing the Death Penalty: Essay on a Cruel and Unusual Punishment* (Philadelphia: Temple University Press, 1989), pp-193-197, p. 196.

¹⁵ C. Michael Lambrix, Isolation of Death Row in Michael L. Radelet(eds.), *Facing the Death Penalty: Essay on a Cruel and Unusual Punishment* (Philadelphia: Temple University Press, 1989), pp-198-202, p. 198.

¹⁶ Robert Johnson, *Condemned to Die: Life Under Sentence of Death* (New York: Elsevier North Holland, 1981), p. 40

¹⁷ Robert Johnson, *Death Work: A Study of the Modern Execution Process* (Belmont CA: Wadsworth, 1998), p.93.

spirit rather than the body. This is not a kind of torture that can be easily proven with photographs, X-rays, and medical reports, although psychiatrists and psychologists have attempted to study the matter. While serving a term in an English jail, Oscar Wilde in his poem 'The Balled of Reading Gaol' attempts to convey the mental suffering of the condemned man, forced to brood upon '[his]is anguish night and day'.¹⁸ In 2010, the feelings of Texas death row prisoners expressed by paintings, cartoons, poetry and prose published into a book.¹⁹ The feeling of a death row prisoner has been portrayed in these lines: 'I like a hungry tiger, focused and driven, I have no time to deviate from the path, cuz with each breath I take, it could be my last'.²⁰ The soul of another death row prisoners has been dissected in these words: 'Being on death row means dealing with pain, hurt, madness, suffering, sadness, hopelessness and depression, and believe it or not, happiness'.²¹

7.2 International Legal Framework on the Death Row Phenomenon

The death row phenomenon has been explicitly recognized as a violation of human rights by international and domestic tribunals 'due to the element of delay, harsh conditions of death row or the cumulative effect of both the element delay and harsh physical conditions on the death row'.²² Moreover 'the exact nature of the doctrine varies among the courts but the underlying concept remains the same'.²³ In this context, the UN Human Rights Committee, the European Court of Human Rights, Privy Council and courts of various countries including India maintain that the death row phenomenon is a violation of human rights.

¹⁸ Oscar Wild, *Plays, Prose Writings and Poems* (London: Everyman's Liberty, 1930), p.524; One of his fellow inmates was a trooper of the Royal Horse Guards, condemned for murdering his lover and sentenced to die within six weeks.

¹⁹ Jennifer Gauntt, Julia Guthrie, Trina Kowis, H. Dave Lewis, Shna Templeton, Robert Uren and Linda Wetzel, *Texas Death Row: Reflections of A Different World* (Huntsville: Texas Review Press, 2010),

²⁰ Ibid, p.53

²¹ Ibid, p.92.

²² Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' (2000) 11(4) *European Journal of International Law* 833, p.838.

²³ Ibid, p.856.

The Human Rights Committee

The Human Rights Committee dealt with a large number of ‘capital punishment cases submitted by inmates detained on death row in state parties to the International Covenant on Civil and Political Rights, mostly in the Caribbean region, who claimed that their rights under the Covenant had been violated’.²⁴ The Committee has generated a considerable amount of jurisprudence on this issue.²⁵ Many of them had complained that ‘the length of their detention on death row constituted inhumane, cruel and degrading treatment, contrary to Article 7 of the International Covenant on Civil and Political Rights’.²⁶

The Human Rights Committee takes an intermediate position on the death row phenomenon. The committee in *Pratt and Morgan v. Jamaica* does not accept delay in judicial proceedings alone as a violation to Article 7 of the International Covenant on Civil and Political Rights: ‘In principle prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary’.²⁷ In another case *Kelly v. Jamaica*²⁸, the Committee held that the harsh conditions experienced on death row in Jamaica, particularly those relating to medical care, did violate Article 10 (all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person). The Committee continued its traditional stance that the prolonged periods of detention on death row do not per se constitute cruel, inhuman or degrading treatment in various cases including *Barrett and Sutcliff v. Jamaica*,²⁹ *Kindler v. Canada*³⁰. For the first time, in the case of *Francis v. Jamaica*, the Committee recognized the death row phenomenon a violation of Article 7 and 10 of ICCPR due to the delay with a

²⁴ Markus G. Schmidt, ‘The Death Row Phenomenon: A Comparative Analysis’ in Theodore S. Orlin, Allan Rosas and Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Turku, Finland: Institute for Human Rights, Åbo Akademi University, 2000), pp.47-72, p.48.

²⁵ P. R. Ghandhi, ‘The Human Rights Committee and the Death Row Phenomenon’ (2003) 43(1) *Indian Journal of International Law*, pp-1-66, p.1.

²⁶ Markus G. Schmidt (n 24), p.49.

²⁷ *Pratt and Morgan v. Jamaica* (Communication No.210/1986 and 225/1987), (1989) UN Doc A/44/40 222, para.13.6.

²⁸ *Kelly v Jamaica* (Communication No. 253/1987),(1991) UN Doc A/46/40 241,para.5.7

²⁹ *Randolph Barrett and Clyde Sutcliffe v. Jamaica* (Communication Nos.270/1988 and 271/1988), (1992) UN Doc CCPR/C/44/D/271/1988, para.8.4.

³⁰ *Kindler v. Canada* (Communication No.470/1991) (1993) UN Doc CCPR/C/48/D 1470/1991.

combination of other factors including the role of the state in the delay, the condition of imprisonment and the mental condition of the prisoner.³¹

Deterioration in the mental health of the prisoner has been considered a ‘further compelling circumstance’ by the Human Rights Committee in *Eustace Henry and Everald Douglas v. Jamaica* found the violation of Article 7 and 10 paragraph 1 was found because the prisoner on death row received ‘inadequate medical treatment for his mental conditions’.³² In *Albert Wilson v. Philippines* the Committee found the violation of Article 7 and 10 on the ground that the mental health of the death row prisoner was exacerbated by his treatment in ,as well as the conditions of his detention.³³ The Committee concluded: ‘Aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death’.³⁴ In *Henry and Douglas*, the prisoners had been on death row for 10 years and suffered severe mental distress the Committee observed: ‘conditions of incarceration under which Mr. Henry continued to be held until his death, even after the prison authorities were aware of his terminal illness, and the lack of medical attention, for the gunshot wounds, received by Mr. Douglas, reveal a violation of Articles 7, and 10 paragraph 1, of the Covenant’.³⁵

A puzzling area of the Human rights committee case-law with respect to death row is the issue of the conditions of detention on death row-an area where Article 7 and 10(1) overlap neatly. The original principle has also been refined and developed in the jurisprudence.³⁶ The complementary relationship of the two provisions of the ICCPR is well illustrated in *Hervin Edwards v. Jamaica*: ‘The period of 10 years alone in a cell measuring 6 feet by 14 feet, let out only for three and half hours a day, was provided with no recreational facilities and received no books’.³⁷ The keeping of a prisoner in such conditions of detention constituted ‘not only a violation Article 10,

³¹ *Clement Francis v. Jamaica* (Communication No.606/1994), (1995) UN Doc. CCPR/C/54/D/606/1994, para.9.1.

³² *Nathaniel Williams v. Jamaica* (Communication No. 609/1995) U.N. Doc. CCPR/C/61/D/609/1995 (4 November 1997), para. 6.5.

³³ *Albert Wilson v. Philippines* (Communication No. 868/1999), U.N. Doc. CCPR/C/79/D/868/1999 (2003), para.7.4.

³⁴ *Ibid*, para.7.4.

³⁵ *Eustace Henry and Everald Douglas v. Jamaica* (Communication No. 571/1994) (1996) U.N. Doc. CCPR/C/57/D/571/1994, para.9.5.

³⁶ P. R Ghandhi, ‘The Human Rights Committee and the Death Row Phenomenon’ (2003) 43(1) *Indian Journal of International Law*, pp-1-66, p. 2.

³⁷ *Hervin Edwards v. Jamaica* (Communication No. 529/1993) (19 January 1993), CCPR/C/60/D/529/1993, para. 8.3.

paragraph 1, but, because of the length of time in which the author was kept in these conditions, a violation of Article 7 was also incurred'.³⁸ The Committee in *Lloyd Reece v. Jamaica*,³⁹ *Dennis Lobban v. Jamaica*⁴⁰ and *Sandy Sextus v. Trinidad and Tobago*⁴¹ refused to examine a possible violation of Article 7 once a violation of Article 10(1) was found.

In its decision in *Raymond Persaud and Rampersaud v. Guyana* where the prisoner had been on death row for 15 years, the Human Rights Committee indicated that it was reconsidering its views on the death row phenomenon, but it did not go as far as to take the plunge and change its position. The committee observed:

As regards the issues raised under Article 7 of the Covenant, the Committee would be prepared to consider that the prolonged detention of the author on death row constitutes a violation of Article 7. However, having also found a violation of Article 6, paragraph 1, it does not consider it necessary in the present case to review and reconsider its jurisprudence that prolonged detention on death row, in itself and in the absence of other compelling circumstances, does not constitute a violation of Article 7.⁴²

In its recent decisions, *Munguwambuto Kabwe Peter Mwamba v. Zambia*, the Committee accepted the prisoner's claim that his detention on death row for over eight years for the hearing of his appeal affected his physical and mental health. The Committee also accepted the prisoner's claim of stress and depression due to 'sleeping in a dirty public toilet: cells are 3 by 3 meters; they accommodate several prisoners and have no toilet facilities, so they must avail of small tins to relieve themselves; TB, malaria and HIV/AIDS, are all prevalent in the prison'.⁴³ The author's conditions of detention, as described, violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to Article 10, paragraph 1.⁴⁴ The Committee provided relief mainly

³⁸ *Hervin Edwards v. Jamaica* (Communication No. 529/1993) (19 January 1993), CCPR/C/60/D/529/1993, para. 8.3.

³⁹ *Lloyd Reece v. Jamaica* (Communication No. 796/1998), (2003) U.N. Doc. CCPR/C/78/D/796/1998

⁴⁰ *Dennis Lobban v. Jamaica*, (Communication No. 797/1998), (2004) UN. Doc. CCPR/C/80/D/797/1998.

⁴¹ *Sandy Sextus v. Trinidad and Tobago*, Communication No. 818/1998, (2001) UN Doc CCPR/C/72/D/818/1998.

⁴² *Raymond Persaud and Rampersaud v. Guyana*, (Communication No. 812/1998), (2006) U.N. Doc. CCPR/C/86/D/812/1998, para.7.3.

⁴³ *Munguwambuto Kabwe Peter Mwamba v. Zambia* (Communication No. 1520/2006), (2010) U.N. Doc. CCPR/C/98/D/1520/2006, para. 2.5.

⁴⁴ *Munguwambuto Kabwe Peter Mwamba v. Zambia*, (Communication No. 1520/2006), (2010) U.N. Doc. CCPR/C/98/D/1520/2006, para. 6.4.

relying on violation of the right of fair trial instead of delay and hard physical conditions.

European Court of Human Rights

On the other hand, the approach of the European Court of Human Rights is different from that of Human Rights Committee. The European Court of Human Rights takes a prolonged period of delay as cruel and inhumane.⁴⁵ In the judgment of *Soering v. United Kingdom*,⁴⁶ the court prohibited the extradition of Soering to the State of Virginia, where he had been charged with a capital offence, on the grounds of the long delay in Virginia between the death sentence and execution and ‘the anguish and mounting tension of living in the ever-present shadow of death’.⁴⁷ It is noteworthy that ‘it was not the death penalty itself that the court found offensive to the Convention, but rather the death row phenomenon the years-long wait for the scaffold under gruesome conditions, both physical and psychological’.⁴⁸ The European Court of Human Rights in the judgment of *Soering v. United Kingdom* separated these circumstances into two further categories: The harsh, dehumanizing conditions of imprisonment itself; and the sheer length of time spent living under such conditions.⁴⁹ The psychological repercussions on the condemned prisoner due to hard physical conditions and long period of detention on death row aggregate to be called the ‘death row syndrome’.⁵⁰ This gave, as Hudson explains, ‘a seed of legitimacy for the doctrine [of the death row phenomenon] in tribunals around the world’.⁵¹ Simultaneously the judgment worked as a precedent and guideline for the court itself for its future decisions.

⁴⁵ Manfred Nowak, ‘Is the Death Penalty an Inhuman Punishment?’, in Theodore S. Orlin, Allan Rosas & Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Turku, Finland: Institute for Human Rights, Åbo Akademi University, 2000), pp.27-45, p.30.

⁴⁶ *Soering vs. United Kingdom* (1989) 11 EHRR 439; *Soering v. United Kingdom*, App. No. 3324/76, 11 Eur. H.R. Rep. 439 (1989).

⁴⁷ *Soering v UK* (1989) 11EHRR439,106.

⁴⁸ Rhone KM Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2012), p. 243.

⁴⁹ *Soering v United Kingdom* (1989) 11 EHRR 439, paras 105,106.

⁵⁰ Amy Smith, ‘Not Waiving but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution’ (2008) 17*The Boston University Public Interest Law Journal* 237, p.242.

⁵¹ Patrick Hudson, ‘Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International law?’ (2000) 11(4) *European Journal of International Law* 833, p.838

The Privy Council

The Judicial Committee of the Privy Council in *Pratt and Morgan v. Attorney General of Jamaica et al.*, passed a ruling as the highest appeal court of the Caribbean States that ‘we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time’.⁵² In the same judgment, the Privy Council gave a threshold period of five years on the death row as a strong ground for a violation of the right against inhuman or degrading treatment.⁵³ To avoid overhasty executions, the Privy Council subsequently clarified in *Guerra v. Baptiste* that the period of five years was a guide ‘not a limit or yard stick’.⁵⁴ In *Henfield v. Attorney General of the Commonwealth of the Bahamas*, the Privy Council observed that where international courts were not approached a period of three and half years was ‘in all the circumstances be so prolonged a time as to render execution as a cruel or inhuman punishment’.⁵⁵

The Judicial Committee of the Privy Council, in its 1993 decision in *Pratt et al. v Attorney General for Jamaica et al.*, referred to the repeated fixing of execution dates as an aggravating factor contributing to the inhuman and degrading treatment that the two petitioners suffered during their fourteen-year stay on Jamaica’s death row.⁵⁶

7.3 Death Row Phenomenon in India, Pakistan and Bangladesh

7.3.1. The Period of Detention at Death Row

The progressive limitations on the death penalty under human rights law, right of inmates to explore every avenue of appeal before the execution and the growth of abolitionist sentiment resulted in an extended period on death row.⁵⁷ It has become difficult to complete the full range of procedural guarantees that are prescribed by international and domestic law within a reasonable period of time. Because of lengthy delays in the dispensation of justice, condemned prisoners often remain in death row

⁵² *Pratt v Attorney General for Jamaica and others* [1993] UKPC1, para.60.

⁵³ *Ibid*, para.85

⁵⁴ *Lincoln Anthony Guerra v. Cipriani Baptiste and Others* [1996] UKPC 3, para.29.

⁵⁵ *Dwight Lamott Henfield v. Attorney General of the Commonwealth of the Bahamas* [1996] UKPC 4, para.35.

⁵⁶ *Pratt v Attorney General for Jamaica and others* [1993] UKPC1, para.

⁵⁷ William A. Schabas, *Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in The World’s Courts* (Boston: Northeastern University Press, 1996), p.96; also see Robert Johnson, *Death Work: A Study of the Modern Execution Process* (Belmont CA: Wadsworth, 1998), p.43.

cells for years, and some for over a decade as their appeals make their painstaking way through labyrinthine judicial systems in India, Pakistan and Bangladesh.

In Pakistan, according to a survey undertaken by AGHS⁵⁸ in 2002 on condemned prisoners, out of a total of 1,500 death penalty appeals pending in High Courts, 28 had been pending for a period between 9 to 12 years, and 326 for the last 6 to 8 years. Of the 217 total cases pending before the Supreme Court, 28 had been pending for the last 9 to 12 years, and 87 for the last 6 to 8 years.⁵⁹

The study, conducted by the Death Penalty Research Project at the National Law University in Delhi, based on interviews with 373 of the 385 inmates confined on death row in various prisons in India, shows a minimum period on death row 6 years and a maximum of 25 years.⁶⁰ According to the research conducted by Reena Mary George⁶¹ by conducting semi-structured interviews of 111 prisoners on death row from 16 prisons based in six different states in India, the period on death row was 5 to 17 years. However, they have been incarcerated for longer the longest for over 22 years.⁶² One prisoner told the interviewer that ‘the waiting period was long and that one died a thousand times a year’.⁶³

The Indian Law Commission Report describes that ‘the death row phenomenon has become an unfortunate and distinctive feature of the death penalty apparatus in India’.⁶⁴ Indian Law Commission Report on the death penalty acknowledges the fact:

It is distressing to note that the death row prisoners are routinely subject to an extraordinary amalgam of excruciating psychological and physical suffering arising out of oppressive conditions of incarceration and long delays in trial, appeal and thereafter executive clemency.⁶⁵

⁵⁸ AGHS is an acronym based on the first letters of the first names of its four founders: Asma Jahangir, Gulrukh Rahman, Hina Jilani and Shahla Zia.

⁵⁹ International Federation for Human Rights & Human Rights Commission of Pakistan, *Slow March to the Gallows: Death Penalty in Pakistan* (2007), p.53.

⁶⁰ Centre on the Death Penalty, *Death Penalty India Report-Summary* (New Delhi: National Law University, 2016), p.12.

⁶¹ Reena Mary George, *Prisoner Voices from Death Row: Indian Experience* (Surrey: Ashgate, 2015), p.33.

⁶² *Ibid*, p.103.

⁶³ *Ibid*, p.103

⁶⁴ Law Commission of India, *The Death Penalty* (Law Com No.262, 2015), para.6.8.3, p. 212

⁶⁵ *Ibid*, para.6.8.3, p. 211.

The Supreme Court of India has discussed the issue of death row ‘in many cases’ but with different results’.⁶⁶ The Supreme Court in *Rajendra Prasad v. State of Uttar Pradesh*, Justice Iyer referred to the six-year period under the sentence of death virtually making the prisoner a vegetable and argued, ‘the excruciation of the long pendency of the death sentence with the prisoner languishing near –solitary suffering all the time, may make the death sentence unconstitutionally cruel and agonizing’.⁶⁷ A judge noted that the person would be more of a vegetable than a person and hanging a vegetable is not the death penalty.⁶⁸ The minority judgment by Justice Bhagwati in *Bachan Singh v. State of Punjab* went much further in finding the death penalty ‘barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel’.⁶⁹

In February 1983, in *Vatheeswaran v. State of Tamil Nadu*, the Supreme Court observed that avoidable delay also makes the process of execution of the death sentence unfair, unreasonable, arbitrary and capricious and thereby, violative of the procedural due process guarantees enshrined under Articles 21, 14 and 19’.⁷⁰ The Supreme Court held that ‘delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under the sentence of death to invoke Article 21 and demand the quashing of the sentence of death’.⁷¹

A three member bench of the Supreme Court in *Sher Singh v. State of Punjab*⁷² observed that the appellate courts in normal course take up to four or five years to process appeals apart from the time spent by the constitutional authorities under Article 72 and 161 in considering the mercy petition. The Court in *Sher Singh* therefore, departed from the fixed period of two years as a rule of thumb propounded by the *Vatheeswaram* Court and held that no pre-determined period of delay can be held to guarantee frustration of the death sentence.⁷³ The Court pointed out that to

⁶⁶ Amit Bindal and C Raj Kumar, ‘Abolition of the Death Penalty in India: Legal Constitutional, and Human Rights Dimensions’ in Roger Hood and Surya Deva (eds.), *Confronting Capital Punishment in Asia: Human Rights, Politics, and Public Opinion* (Oxford: Oxford University Press, 2013). pp.123-140, p.131.

⁶⁷ *Rajendra Prasad v. State of Uttar Pradesh* AIR1979 SC916; 1979 SCR (3)78, 117.

⁶⁸ *Ibid.*

⁶⁹ *Bachan Singh v. State of Punjab* 1983 SCR (1)145 at 284.

⁷⁰ *T.V. Vatheeswaran v The State of Tamil Nadu* (1983) 2 SCC 68, p.20.

⁷¹ *Ibid.*, para.21; Article 21 says: No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁷² *Sher Singh v. State of Punjab* (1983) 2 SCC 344

⁷³ *Ibid.*

impose a strict time limit of two years would enable a prisoner to defeat the ends of justice by pursuing a series of frivolous and untenable proceedings.⁷⁴ The Supreme Court in *Sher Singh* also held that in such Article 32 petition a death row convict cannot be allowed to take advantage of delay which is caused on account of proceedings filed by him to delay the execution.⁷⁵

Owing to the conflict in these two decisions, a five judge bench of the Supreme Court was constituted to clarify the legal question of whether the delay of two years in the execution itself be a ground to commute capital punishment to life imprisonment. The Supreme Court in *Triveniben* held that the delay for the purpose of an Article 21 claim made by the convict could only be said to kick in once the judicial process has come to an end ‘the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive’.⁷⁶ It did not coincide with the approach of the Human Rights Committee and the Privy Council which counts the time spent on death row from the time the death sentence is awarded. Secondly the Supreme Court may consider the question of ‘inordinate delay’ in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into an imprisonment for life.

The limited guidelines issued by the Supreme Court in *Triveniben* were followed with inconsistency. In 1999, the Supreme Court in *Daya Singh* held the delay in clemency was not the only factor to commute, so the bench directed commutation on ‘cumulative grounds’ after taking into account the prisoner’s incarceration for nearly two decades of which he had been under the sentence of death for 13 years.⁷⁷ The Supreme Court considered the time on death row during judicial proceedings as a mitigating circumstance in determining whether to commute the death sentence. In February 2011, the Supreme Court in *Ramesh v. State of Rajasthan*⁷⁸ commuted a death sentence on appeal with one mitigating circumstance being that the accused was ‘languishing in the death cell for more than six years’ since he had been sentenced by the trial court.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Triveniben v. State of Gujarat* (1989)1 SCC 678, para.16.

⁷⁷ *Daya Singh v. Union of India and Others* AIR 1991 SC 1548.

⁷⁸ *Ramesh v. State of Rajasthan* (2011) 3 SCC 685

In *Devender Pal Singh Bhullar v. State of N.C.T of Delhi*, the Supreme Court dismissed the application for commutation into life imprisonment on the ground of unreasonable delay of 8 years in disposal of the mercy petition.⁷⁹ In this case, the Supreme Court debated on terrorism as a heinous offence instead of focusing on cruelty and inhumanity of the death row phenomenon.

After three years in the case of *Shatrughan Chauhan v. Union of India*, a three-judge bench of the Indian Supreme Court held an excessive delay in carrying out the death sentence was an essential mitigating factor in a plea for commutation:

we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence. However, the nature of delay i.e whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.⁸⁰

In the Curative Petition submitted by the wife of Devender Pal Singh Bhullar, the Supreme Court in *Navneet Kaur v. State of NCT of Delhi & Anr* commuted the death penalty in life imprisonment on the ground of ‘unexpected/inordinate delay of 8 years in disposal of the mercy petition and on the ground of insanity’.⁸¹

In short in the majority of cases, an inordinate delay requires additional compelling circumstances. In this regard, the Indian stance is closer to that of the Human Rights Committee. Unlike the Privy Council and the Human Rights Committee the Indian Supreme Court calculates delay on death row after the rejection of appeal in the Supreme Court. But there are instances wherein the Supreme Court did not rely on only clemency period to commute the sentence of death but also takes into account the total period spent on death row.

7.3.2. Solitary Conditions of Detention

The Indian subcontinent inherited prisons system from British colonial rule in India. Thomas Babington Macaulay, the head of the Indian Law Commission, reinforced in his minutes recorded on December 14, 1834 that 'the best Criminal Code can be of very little use to the community unless there be a good machinery for the infliction of

⁷⁹ *Devender Pal Singh Bhullar v. State of N.C.T of Delhi*, (2002) 5 SCC 234, para.44 He was charged with bomb blast in Delhi in 1993 that claimed the life of nine persons. His trial was conducted in Special Court under TADA was sentenced to death.

⁸⁰ *Shatrughan Chauhan & Another vs. Union of India & Others*, 2014(1) SCALE437, para.54.

⁸¹ *Navneet Kaur v. State of NCT of Delhi & Anr* (March 31, 2014).

punishment'.⁸² Thus, imprisonment, 'the chief form of punishment' had to be made a 'terror to wrong-doers'.⁸³ In this context, when George Campbell took over as the lieutenant-governor of Bengal in 1871 and he implemented the policy of 'making the prisoner feel the pain and torment of incarceration'.⁸⁴

In light of the policy, within the macro-structural punitive institution of the jail 'newer forms of micro-structural penalties were invented by the jail authorities to extend the pain of his/her original sentence'.⁸⁵ The motif of disciplining the prisoners was based on adopting two kinds of methods- firstly the prohibitive measures including the denial of basic rights, and secondly corporal punishments including physical torture. Fetters, the system of chain gang, whipping, solitary confinement, and denial of food, were some of the forms of punishment that were to be followed in Alipore, Presidency and other jails of Calcutta all through the nineteenth century.⁸⁶

Solitary confinement in cellular prisons or within a prison was another technique to exacerbate the pain of prisoners. To punish the 'guilty of breaches of jail discipline' a range of solitary cells were in operation; in which offenders might be confined in darkness and silence.⁸⁷ 'Solitary confinement' was the extreme form of such segregation.⁸⁸ This was a penalty that was not invented for Indian prisoners alone but was being experimented with even in European Jails, where the cell system was introduced to move certain types of criminals to total isolation. The European prison with which comparisons arise most easily is London's Pentonville. Ignatieff has stressed the dehumanizing nature of the Pentonville system by referring to the prison as 'the new discipline of solitude and silence' and its daily routine as a 'machine'.⁸⁹

On the Model of Pentonville, the cellular jail in Port Blair, the capital of the Andaman and Nicobar (known as Blackwater-Kala Pani) was designed to function as

⁸² C.D Dharker, *Lord Macaulay's Legislative Minutes* (London: Oxford University Press, 1946), p.278; Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959), p.217.

⁸³ C.D Dharker (n 82), p. 279.

⁸⁴ Charles Edward Buckland, *Bengal Under the Lieutenant-Governors from 1854 to 1898. vol. I* (Calcutta: S.K. Lahiri & Co., 1901), p. 534.

⁸⁵ Sumanta Banerjee, *The Wicked City: Crime and Punishment in Colonial Calcutta* (New Delhi, Orient Black Swan, 2009), p.576

⁸⁶ Ibid, pp. 576-77.

⁸⁷ James Hutchinson, Esq, *Observations of the General and Medical Management of the Jails and on the Treatment of Some of the Principal Diseases Which Infest Them* (Calcutta: G. H. Huttman, 1845), p.86.

⁸⁸ Report of the Committee on Prison-Discipline (Calcutta: Baptist Mission Press, 1838), para 267.

⁸⁹ Michael Ignatieff, *A Just Measure of Pain* (London: Macmillan, 1978), pp. 3-5.

a machine in the process of punishment and reform. To serve the purpose, huge buildings of prisons with cellular cells were built during the British regime across the Indian subcontinent. The new punishment and the new prison, whether it was Pentonville Port Blair or Indiaman, aimed to correct the criminal through combinations of segregation, surveillance, labor and medicine.⁹⁰ The kind of treatment of offenders especially punishments were ‘cruel and incompatible with human dignity’.⁹¹

The prisons rules in vogue in India, Pakistan and Bangladesh are one of the legacies of British Colonial rule in India. Under Section 30 of the Prison Act 1894, the prisoners under the sentence of death are segregated from other prisoners: ‘Every such prisoner under sentence of death shall be confined in a cell apart from all other prisoners and shall be placed by day and night under the charge of a guard’.⁹² The first clause of Section 30 maintains : ‘ After such admission of the prisoner in the jail, the Deputy Superintendent is required to examine the cell and has to satisfy her/himself that it is secure and has no article which can be used as a weapon or instrument with which the prisoner can commit suicide’.⁹³ The provision of segregation of prisoners under the sentence of death is strictly adhered to and honored by the prisons administration in these countries. After the judgment of the trial court, the prisoner is immediately transferred to a high security yard if he or she was already in a central prison. If the person is confined in a District Prison or Sub-Jail, he/she is taken to the Central Prison the next day or sometimes even the same evening.

The prisons administration in these countries may have many reasons to justify the segregation of death row prisoners. One of the frequently quoted reasons of the segregation is ‘the security of other prisoners and prison guards, for whom exposure to a desperate individual with literally nothing to lose may be dangerous’. William Schabas is not convinced with the stated reasons for segregation of prisoners under the sentence of death and he considers the rationale and justification for segregation

⁹⁰ Satadru Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi: Oxford University Press, 2000), p.14.

⁹¹ Jörg Fisch, *Cheap Lives and Dear Limbs: the British Transformation of the Bengal Criminal Law, 1769-1817* (Wiesbaden: Franz Steiner Verlag, 1983), p.130.

⁹² The Prisons Act, 1894, (Act No. IX of 1894), section 30(2).

⁹³ Jail Manual of Punjab and Haryana (Chapter XXXXI, Para 847(1) and (2).

‘are somewhat obscure’.⁹⁴ The UN Special Rapporteur on Torture, Juan E Mendez following his predecessor Manfred Nowak has condemned solitary confinement at death as ‘cruel, inhuman or degrading treatment’.⁹⁵ The Istanbul Statement on the use and effects of solitary confinement absolutely prohibits the use of solitary confinement for death row prisoners by virtue of their sentence.⁹⁶ However, the Istanbul Statement is not legally binding upon these countries.

The prisons administrations in India, Pakistan and Bangladesh consider the prisoners under the sentence of death as the most dangerous of prisoners and rate them as ‘high escape risk’. The theme of custody permeates and circumscribes death row in these countries. Robert Johnson categorizes two kinds of death rows namely reformed and unreformed.⁹⁷ Under this classification, death row in India, Pakistan and Bangladesh may be categorized as unreformed regimes that offer unadorned long term solitary or near solitary confinement. Block of cells and cells where the death row prisoners are confined are run by disciplinary precisions. Watched closely and frisked often. The condemned prisoner spends the bulk of each day alone in his cell. Unlike the convict prisoners, death row prisoners are not allowed to work inside the facility and they spend their time in their death cells. They were allowed an hour's walk in the morning, and another hour in the evening with handcuffs.⁹⁸ Death cells operate on the “22+ 2” system: 22 hours locked in a cell, followed by 2 hours of recreation out of the cell. The outdoor recreation takes place in a cage. The Prisons Rules in vogue in these countries describe that a prisoner under the sentence of death prisoners cannot be taken out of its cell without hand cuffs.⁹⁹ The Pakistan Law Commission recommended that ‘the rule pertaining to the use of hand cuffs during the walk may be applied only in respect of terrorists and dangerous criminals’.¹⁰⁰

⁹⁴ William A. Schabas, *Death Penalty as Cruel Treatment and Torture: Capital Punishment Challenged in The World's Courts* (Boston: Northeastern University Press, 1996), p.96.

⁹⁵ The UN Special Rapporteur on Torture, Juan E Mendez, (9 August 2012) UN Doc A/67/279, para.48; also see UN Doc A/66/268.

⁹⁶ The Istanbul Statement was adopted on 9 December 2007 at the Fifth International Psychological Trauma Symposium in Istanbul, Turkey, by a working group of 24 international experts, including doctors, academics, civil society and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak. The Istanbul Statement was annexed in the interim report by Manfred Nowak to the UN General Assembly on 28 July 2008.

⁹⁷ Robert Johnson, *Death Work: A study of Modern Execution Process* (West/Wadsworth: International Thomson Publishing Company, 1998), p.84.

⁹⁸ Pakistan Prisons Rules 1978, Rule no.340.

⁹⁹ Pakistan Prisons Rules 1978.

¹⁰⁰ Pakistan Justice and Law Commission, *Jail Reforms* (Law Com No.23, 1997), p.33

The question is whether the pervasive custodial measures including the physical setting as punitively austere, surveillance and restricted outdoor movements out of their cells tantamount to solitary confinement. The Supreme Court of India in *Sunil Batra v. Delhi Administration* deliberated the issue and discussed the death row at length. Firstly, the Court observed: ‘Sections 73 and 74 of the Indian Penal Code leave no room for doubt that solitary confinement is by itself a substantive punishment which can be imposed by a court of law. It cannot be left to the whim and caprice of prison authorities’.¹⁰¹ Similar to the approach of European Commission on Human Rights,¹⁰² the Court did not void section 30 of the Prison Act 1894 itself but the Court issued directions to alleviate the additional hardships due to segregation of death row prisoners. The Court further explains the safe custody under the law: ‘To distort safe-keeping into a hidden opportunity to cage the ward and to traumatize him is to betray the custody of the law. Safekeeping means keep in his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe keeping. To preserve his flesh and crush his spirit is not safe keeping’.¹⁰³

Secondly, the Supreme Court explained the threshold of custodial segregation and defined a prisoner under the sentence of death: ‘A prisoner under sentence of death in the context of Section 30(2) of Prison Act 1894 can only mean a prisoner whose sentence of death has become final, conclusive and infeasible which cannot be annulled or avoided by any judicial or constitutional procedure’.¹⁰⁴ The Supreme Court categorically observed that separate confinement may only be imposed when a prisoner is under an executable sentence of death. ‘A prisoner becomes legally subject to self-working sentence of death only when the clemency application by the prisoner stands rejected’.¹⁰⁵ In this regard, the Court argued: ‘Death trial does not end in the Sessions Court and confirmation proceedings in the High Court are a

¹⁰¹ *Sunil Batra v. Delhi Administration* (1979) SCR (1) 392, p.393.

¹⁰² In *Jarmo Koskinen v Finland*(app.no.20560/92), (1994) 14 E.H.R.R: ‘The removal of a prisoner from association with fellow inmates for security, disciplinary or protective reasons does not normally amount to inhuman treatment. Although the commission holds segregation to be undesirable, the issue of a breach of article 3 of the European Convention depends on a number of factors, including stringency of the regime, duration, and purpose, as well as its effects on the person concerned

¹⁰³ *Sunil Batra v. Delhi Administration* (1979) SCR (1) 392, p.400.

¹⁰⁴ *Ibid*, para.393.

¹⁰⁵ *Ibid*, para.401.

continuation of the trial. In other words’ until the High Court confirms a sentence of death, there is no operative executable sentence of death’.¹⁰⁶

The petitions of different death row prisoners in different High Courts and the Supreme Court reflect that the direction of the Supreme Court remained a wish list and nothing changed on the ground. It is also evident from the writ petition of Mahendra Nath Das¹⁰⁷ before the Gauhati High Court for commutation of his death sentence. The petitioner contended that for over 14 years since being sentenced to death: he ‘has been kept in solitary confinement, deprived of all human companionship, with the threat of imminent death hanging over his head’. Another death row prisoner Bhullar approached the Indian Supreme court in May 2011, in addition to raising similar concerns of ‘extreme inhuman suffering and great mental torture’ caused due to spending 22 hours a day in a 7 by 9 feet cell for over 10 years.¹⁰⁸

The Supreme Court lamented in *Shatrughan Chauhan & Another vs. Union of India & Others* about the existence of widespread use of solitary confinement for prisoners on death row and urged the prison authorities to implement the Sunil Batra decision in its letter and spirit: It is completely unfortunate that despite enduring pronouncement on the judicial side, the actual implementation of the provisions is far from reality’.¹⁰⁹ The Court reiterated its stance on death row: ‘Even in *Triveniben V. State of Gujrat*,¹¹⁰ this court observed that keeping a prisoner in solitary confinement is contrary to the ruling given in *Sunil Batra v. Delhi Administration* and would amount to inflicting ‘additional and separate punishment not authorized by law’.¹¹¹ Bikramjeet Batra, an expert on capital punishment in India explains the reason that ‘unfortunately the Indian Supreme Court limited its engagement with death row only to that of delay caused by non-disposal of the mercy petition, there has been little

¹⁰⁶ Ibid.

¹⁰⁷ *Mahendra Nath Das v The Union of India and others*, writ petitions crl no. 35/2011.

¹⁰⁸ *Devender Pal Singh Bhullar v State of NCT of Delhi*, WP(Crl) D No 16039/2011.

¹⁰⁹ *Shatrughan Chauhan & Another v. Union of India & Others*, (2014) 3SCC1, para 91.

¹¹⁰ *Triveniben v. State of Gujrat* (1989) 1SCC 678.

¹¹¹ *Shatrughan Chauhan & Another v. Union of India & Others*, (2014) 3SCC1, para 91.

monitoring by the Court of actual conditions of detention, including solitary confinements’.¹¹²

Inordinate delay with solitary confinement is one of the mitigating factors to commute capital punishment. In a number of its own judgments including *T.V Vatheeswaran V. State of Tamil Nadu*, *Ramesh v. State of Rajasthan*¹¹³, *Vinayak Shivajirao Pol v. State of Maharashtra*,¹¹⁴ the Court refers to the prisoners being in ‘death cells’ or solitary confinement immediately after being sentenced to death, yet there has been no attempt to reiterate the law laid down in *Sunil Batra*, or hold the prisons authorities liable for its violation.

In 2009, the Supreme Court in *Jagdish v. State of Madhya Pradesh*. ruled that delayed executions failed to serve both the retributive and deterrence rationales of the death penalty. The Court observed: ‘Penologists and medical experts agreed that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture’.¹¹⁵ The Supreme Court in *Ajay Kumar Pal v. Union of India* commuted the death sentence into life imprisonment on account of delay in disposal of mercy petition by executive authorities and imposition of solitary confinement.¹¹⁶ The judgment of the Division Bench of the Allahabad High Court in *Peoples Union of Democratic Rights v. Union of India & Others* considered solitary confinement as a relevant supervening circumstance to commute the death sentence.¹¹⁷

In Pakistan, the Justice and Law Commission also noticed the inhumane aspect of death row prisoners and in its report the commission recommended that jail administration must not keep prisoners under the sentence of death in death row cells until the confirmation of sentence of death by the respective High Court.¹¹⁸ In 2009, the Supreme Court’s National Judicial Policy Making Committee recommended that all prisoners whose appeals against the death penalty were pending before a high court

¹¹² Bikramjeet Batra, Don’t Be Cruel: The ‘Death Row Phenomenon’ and India’s ‘Delay’ Jurisprudence in Roger Hood & Surya Deva(eds.) *Confronting Capital Punishment in Asia* (Oxford: Oxford University Press, 2013), pp-287-312, p.303.

¹¹³ *Ramesh v. State of Rajasthan* (2011)3 SCC 685.

¹¹⁴ *Vinayak Shivajirao Pol v. State of Maharashtra* (1998) 2 SCC 233.

¹¹⁵ *Jagdish v. State of Madhya Pradesh* (2009) 9SCC 498.

¹¹⁶ *Ajay Kumar Pal v. Union of India*, (2014) 13 SCALE 762.

¹¹⁷ *Peoples Union of Democratic Rights v. Union of India & Others*, (28 January, 2015). Criminal Misc.No.23471 of 2014.

¹¹⁸ Justice and Law Commission Report, *The Rights and Privileges of Prisoners*, p.21

should be kept, with adequate security arrangements, in regular barracks instead of death row cells.¹¹⁹ In this regard, the Punjab Government, for instance, amended Rule 330 of Pakistan Prisons Rule 1978 that has made it mandatory for Prison Superintendent to ensure that a condemned prisoner is not kept in a death row cell until the sentence is upheld by the High Court concerned'.¹²⁰ This amendment was not meant for those whose appeals were pending with the Supreme Court or the mercy petition with the President of Pakistan.

But practically the amendment has not been implemented due to non-availability of space and security reasons. In 2011, the Crisis Group interviewed prisons authorities in Lahore, Quetta and Karachi who said: ' unless separate barracks are built, condemned prisoners cannot be shifted to regular barracks in already grossly overpopulated prisons'.¹²¹ The prisons administration in Pakistan defends the custodial measures for the confinement of prisoners under sentence of death. In overcrowded detention facilities, it is a great risk to incarcerate death row prisoners in general barracks.¹²² The appellate courts in Pakistan never provided relief on the basis of the death row phenomenon.

7.3 Physical Conditions at Death Row Cells

In addition to the segregation of condemned prisoners in the name of security and good control, the conditions under which they are imprisoned are even worse than other detainees and convicts in the prison.

The physical settings of the death row are intimidating. The death row prisoners are confined in cells or block of cells which are separated by the general prisons population. This area of confinement is separated from general prisons population secured by many locked gates. It is not a ward in a hospital where sick people wait to die. People here wait to be taken out of their cells and killed'.¹²³ With respect to

¹¹⁹ National Judicial Policy, 2009", Supreme Court of Pakistan, <http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf> [accessed on August 6,2016].

¹²⁰ Pakistan Prisons Rules 1978.

¹²¹ International Crisis Group, *Reforming Pakistan Prisons System, Asia Report No.212*, 12 October 2011, p.21.

¹²² Anwer Hussain Sumra, 'Moving Condemned Prisoners to Ordinary Barracks not Feasible' Lahore: Daily Times, 16 September 2009.

¹²³ Helen Prejean, *Dead Man Walking* (London: Fount Paperbacks,1993), p. 35.

physical hardship, death row is a prison within prison-physically. One can hear empty sound of the changing of the steel doors, the rattle of chains. There is an extraordinary system of watch and vigilance, and body searches. The high security yard is very similar to super maximum custody; colloquially known as ‘supermaxi’ in the United States.¹²⁴ Many prisons have in-house gallows – a remnant from colonial times – which are a constant reminder of looming execution. Owing to their horrible settings, the death row blocks in various prison are known among prisoners by different names like ‘*Anda*’ (Egg Barrack), *Andheri* (darkness) yard and *phasi pehra* (hanging yard).

In the majority of prisons in the Indian subcontinent, death row cells are grouped into five in a row, each group sharing a twenty foot-square caged concrete veranda where the condemned can walk for an hour a day. Cells are small, cramped, bare and uninviting. The Pakistan Law Commission report based on a survey of central prisons in all provinces of the country identified: ‘Normally these are very small rooms measuring 9 by 12 feet attached with WC in corner, rounded by a wall of 3’ height’.¹²⁵ The door has iron bars which can be locked and unlocked from the outside. Since there are no alarm buttons in the cells, the prisoners are left to their own devices when trouble develops.

On the death row, in India, Pakistan and Bangladesh, the rhetoric of rehabilitation is meaningless: one is there waiting to die, not trying to be improved. All activities of life from taking bath to eating food are performed in the cell. A Home office, United Kingdom report on Prisons Conditions in Pakistan reveals that ‘the living condition in prisons is reportedly worse for those who on death row’.¹²⁶ With reference to prisoners on death row in Pakistan, the International Crisis Group reported in 2011, the conditions under which they are imprisoned are even worse than for other detainees’.¹²⁷ The study on the Indian death row, based on interviews of the prisoners, reflects: ‘There were no fans in any of the cells because there was a fear among the authorities that the prisoners might commit suicide if there was a fan in the cell’.¹²⁸

¹²⁴ Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton: Princeton University Press, 1958), p. (xxxi).

¹²⁵ Pakistan Justice and Law Commission, *Jail Reforms* (Law Com No.23, 1997), p.33,

¹²⁶ Home Office, Country Information and Guidance Pakistan: Prisons Conditions, 2016, para.2.52

¹²⁷ International Crises Group, *Reforming Pakistan’s Prison System: Asia Report N0.212-12 October 2011*, p.20.

¹²⁸ Reena Mary George, *Prisoner Voices from Death row: Indian Experience* (Farnham: Ashgate, 2015), p. 93.

The prisoners on death row stated that the temperature in the cell was very hot during summer, wet during the monsoon and cold during winter'.¹²⁹ Similar to how Sykes describes: like so many animals in their cages, the inmate population would be an aggregate rather than a social group, a mass of isolates rather than a society'.¹³⁰

The statistics reveal that death row cells in Bangladesh and Pakistan are highly overcrowded. The cells used for the confinement of death row were originally built for one person but currently the number of inmates varies from 3 to 11. Amnesty International figures show a total 1,425 death row prisoners are confined in various prisons in Bangladesh. About 1,200 hundred death row prisoners are confined in 12 central prisons of the country.¹³¹ One of the reasons of this overcrowding in Bangladesh is a great disparity between the number of death sentences imposed and the number carried out. A Report published by Amnesty International suggests that there were a minimum of 468 deaths sentences passed and 28 executions from 2007 to 2012, with at least 1100 on the death row at the end of 2014. According to Professor Roger Hood, 'It appears that in Bangladesh as in many other low execution countries, death row is perpetually expanding'.¹³²

The reports of different NGOs and government constituted commissions portray that most of the death row cells are overcrowded which add to prevailing harsh conditions. The Pakistan Law Commission report on Jail Reforms identifies the 3 to 6 prisoners are kept in one death cell'.¹³³ According to the Amnesty International Report, 7,000 death row prisoners are confined in various prisons in Pakistan which is one-third of total death row population in the world.¹³⁴ The statistics of Punjab Prisons Department reflects 5,153 out of 7,000 prisoners under the sentence of death are confined in various jails under the jurisdiction of the province of the Punjab.¹³⁵ The death row population is concentrated in seven Central Prisons situated in different cities namely, Lahore, Gujranwala, Sahiwal, Sheikhupura, Rawalpindi, Faisalabad

¹²⁹ Ibid, p.93.

¹³⁰ Gresham Sykes M, *The Society of Captives: A study of a Maximum Security Prison* (Princeton: Princeton University Press, 1958), p.5.

¹³¹ <http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=8&nome=bangladesh>

¹³² Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), p.116.

¹³³ Pakistan Justice and Law Commission, *Jail Reforms* (Law Com No.23, 1997), p.33

¹³⁴ Amnesty International, *Death Sentences and Executions in 2015* (London: Amnesty International, 2016), p.37.

¹³⁵ Total death row prisoners (5153) confined in different jails in the province of Punjab.
<http://www.prisons.punjab.gov.pk/Prisoners_statistics_jail_wise> accessed October 14, 2016.

and Multan.¹³⁶ The Justice Project Pakistan's report reveals that 'extreme overcrowding sometime causes nine or more prisoners to be held in each cell'.¹³⁷ The recently published book on death row in Pakistan describes the death row in one of the oldest and the biggest prion situated in the city of Sahiwal: 'Death row consists of five wards, or barracks, of around forty-five cells. Although built for one man, each of these cells now houses as many as three-making a total of between 400 and 600 condemned prisoners in Sahiwal'.¹³⁸ Hands-off Cain Pakistan profile reported: 'Prisoners in Pakistan, especially those on death row, live in cramped, overcrowded cells and often face abuse'.¹³⁹

Overcrowding at death row cells makes the physical conditions horrific. 6 to 9 persons in a cell provoke scuffle and fighting on petty issues. Especially in the summer days, the inmates cannot sleep properly. The daily life at overcrowded cells may be a source of pressure, harassment, sometimes violent victimization. Privacy concerns are also salient. Unlike solitary confinement, in overcrowded death row cells, prisoners are not alone at least and they get ample opportunity to share their feeling with other inmates. In fact, congenial conversation with other mates offer only limited opportunities for autonomous action or emotional support. It is rightly portrayed: 'In the congregated death row, the prisoner is a kind of leper confined his disease –mates to a steel and concrete colony'.¹⁴⁰

On the contrary to conditions of death row in Pakistan and Bangladesh, the death row cells are not overcrowded in Indian prisons despite three fold overcrowding in Indian prisons. The study conducted by the National Law University, Delhi, reveals that the combination of solitary confinement with the sentence of death is particularly inhumane and the narratives of prisoners revealed the depth of suffering such prisoners undergo.¹⁴¹ The empirical study conducted by Reena also noted: 'Overcrowding in prison is very common but it was truly unheard of that death row

¹³⁶ The Punjab Prisons

Department.Pakistan<http://www.prisons.punjab.gov.pk/Prisoners_statistics_jail_wise> accessed October 14, 2016.

¹³⁷ Justice Project Pakistan, The Death Row Phenomenon, <http://www.jpp.org.pk/death-row/>

¹³⁸ Isabel Buchanan, *Trials: on Death Row in Pakistan* (London: Jonathan Cape,2016), p.118

¹³⁹ Hands off Cain <<http://www.handsoffcain.info/bancadati/schedastato.php?idstato=20000050> >

¹⁴⁰ Robert Johnson, *Death Work: A study of Modern Execution Process* (West/Wadsworth: International Thomson Publishing Company, 1998), p.84.

¹⁴¹ Centre on the Death Penalty, *Death Penalty India Report-Summary* (New Delhi: National Law University ,2016), p.36.

was also overcrowded'.¹⁴² But the researcher received complaints of death row prisoners about the isolation and solitary confinement. She met a prisoner who was in a single cell for over 17 years. In the solitary death row, the prisoner is an outcast who feels himself buried alive. Reena quotes the interview of one female death row prisoner: 'During the day she is out with the other women but at night, she is in a separate cell and feels very scared. She said that she chanted the name of God at night and tried to go to sleep'.¹⁴³ The Indian Law Commission Report recognizes 'solitary confinement and prevailing harsh conditions' at the death row'.¹⁴⁴

In short, whether the death row prisoner is confined in an overcrowded cell or alone in a cell, life at death row is painful and degrading. The bleak quality of life on death row, isolated or congregated, portrays the common goal: human storage.

7.4 Denial of Basic Rights in the Name of Safety and Security

In the name of safety and safekeeping, the basic rights of death row prisoners are denied by prisons administration in India, Pakistan and Bangladesh. Dangerousness, discipline and security are palatable expressions for the management of prisoners under the sentence of death.

7.4.1. Medical Facilities

The Prisons Act 1894 obliged to establish a hospital inside the jail run by medical officers assisted by necessary paramedical staff.¹⁴⁵ In this regard, practice is different from theory. Firstly, hospitals in the jails are not equipped with necessary equipment and medicines to treat serious diseases. Secondly, owing to extra security measures to prevent any attempt to escape, both the Medical Officer and the Superintendent of prisons are reluctant to exercise their power to send death row prisoners to hospitals outside the facility. The study on the death row in India reveals that the prisoners have to do hunger strike to get the right of treatment. Reena quotes the interview of a death row prisoner who suffered from kidney disease and the jail administration did not send him to outside the jail hospital despite his repeated requests.¹⁴⁶ She narrates: 'This prisoner became seriously ill one day and still he was not taken to the hospital.

¹⁴² Reena Mary George, *Prisoner Voices from Death row: Indian Experience* (Farnham: Ashgate, 2015), p. 95.

¹⁴³ Reena Mary George, *Prisoner Voices from Death row: Indian Experience* (Farnham: Ashgate, 2015), p. 94.

¹⁴⁴ Law Commission of India, *The Death Penalty* (Law Com No.262, 2015), para. 6.7.4.

¹⁴⁵ Prisons Act 1894, (IX of 1894), Section 39.

¹⁴⁶ Reena Mary George(n 143)p.99.

So all the prisoners on death row in his particular the prisoner went to a hunger strike and the prisons administration shifted the prisoner to the hospital'.¹⁴⁷ The National Law University, Delhi study also endorses the fact: 'we came across instances of prisoners being denied basic medical attention and even instances of gross negligence in the failure to diagnose terminal illnesses until it was very late'.¹⁴⁸ The Country Report of Bangladesh, prepared and published by the Home Office, United Kingdom, reveals poor health and hygiene conditions in all prisons.¹⁴⁹

The mental health of death row prisoners is a much ignored area in these countries. The prisons administration is pedantic to exercise its power to shift a convicted prisoner to mental hospital especially of death row prisoners.¹⁵⁰ The report says that little awareness of mental health issues and psychological illness at death row prisoners in Pakistan.¹⁵¹ There is no official data of mentally disordered prisoners is available in Pakistan but 'anecdotes from mental health professionals working there suggests that psychiatric morbidity in prisons has been steadily increasing'.¹⁵² There is no credible research on the impact of the death penalty and conditions of incarceration on the mental health of prisoners in these countries. A report quotes the Inspector General of Punjab Prisons Department, Pakistan: 'Such prisoners do develop psychological issues but most of them are not related to jails as they can't remain detached from the society and the problems that their families face once they are incarcerated'.¹⁵³ The Report of National Law University, Delhi, identified the problem of mental health among death row prisoners in India and it showed its concern regarding their treatment.¹⁵⁴

Even the courts in these countries are reluctant to provide relief to a prisoner under sentence of death on the ground of unsound mind. In 2012, Imdad Ali, convicted of the murder of a religious teacher in 2002, was diagnosed as a case of 'paranoid

¹⁴⁷ Ibid, p.99.

¹⁴⁸ Centre on the Death Penalty, *Death Penalty India Report-Summary* (New Delhi: National Law University, 2016), p.36.

¹⁴⁹ Home Office, Country Information and Guidance: Bangladesh (2015), para.2.1.2.

¹⁵⁰ Prisons Rule allowed Superintendent of prison to shift a convict prisoner of unsound mind to mental hospital subject to medical certificate under Lunacy Act IV of 1912.

¹⁵¹ Irfan Aslam, Caged: Behind the Walls of Pakistan's Prisons (September, 07, 2014, the Dawn)

¹⁵² Yasir Abbasi & Khuram Hafeez Khan, 'Forensic Psychiatry- Is There a Role of Psychiatric services in Pakistani Prisons (2009) 59(2) Journal of Pakistan Medical Association 116, p.116.

¹⁵³ Irfan Aslam, Caged: Behind the Walls of Pakistan's Prisons (September, 07, 2014, the Dawn). This Article quotes Mian Farooq Nazir, Inspector General of Prisons in the province of Punjab.

¹⁵⁴ Centre on the Death Penalty(n 48), p.37.

schizophrenia' by the Medical Board in Nishtar Hospital Multan, Pakistan.¹⁵⁵ On October 20, 2016, the Supreme Court of Pakistan in *Mst. Safia Bano w/o Imdad Ali v. Government of Punjab, Pakistan* ruled that schizophrenia does not qualify as a "mental disorder" as defined in the Mental Health Ordinance, 2001.¹⁵⁶ The Court also quoted the precedent from Indian jurisdiction wherein the Indian Supreme Court in *Amrit Bhushan Gupta v. Union of India*¹⁵⁷ rejected the plea to commute the death sentence on the ground of unsound mind suffering from schizophrenia certified by the Medical Superintendent and a Senior Psychiatrist, Hospital for Mental Diseases, Shahdara, Delhi. The rejection of Imdad Ali' plea on insanity paved the way for his execution because his mercy petition had already been rejected by the President of Pakistan. Amnesty International and the UN Human Rights Commission have raised their serious concerns. Champa Patel, Amnesty International's South Asia Director says: 'Pakistan is clearly in breach of international human rights standards that protect people with mental illnesses and ensure that they are never subject to this cruel and irreversible punishment'.¹⁵⁸

7.4.2. Humiliation to Relatives and Friends

To contact with the outside world is one of the basic rights of all persons who have been deprived of their liberty.¹⁵⁹ The treatment of family members of death row prisoners is an acid test of prisons administration and it had a direct impact on the safety and security of a prison.¹⁶⁰ In these three countries, visits are not a matter of right but rather a privilege. Visit to prisons is a big challenge for families of prisoners especially for those having an extremely vulnerable economic status. In addition 'to cost prohibitive of travelling across large distances, families had to encounter *mulaqat* (meeting) conditions'.¹⁶¹ It is pertinent to mention that visitors of the death row inmates have to go inside the prisons facility. When the family members get to the prisons they are subject to somewhat degrading checks and searches consistent with

¹⁵⁵ *Mst. Safia Bano w/o Imdad Ali versus Home Department, Government of Punjab, Pakistan*, Civil Petition No.2990 of 2016, para.2.

¹⁵⁶ *Ibid*, para.10.

¹⁵⁷ *Amrit Bhushan Gupta v. Union of India* (AIR 1977 SC 608).

¹⁵⁸ Amnesty International, Pakistan: Stop execution of Death Row Prisoner with Mental Disability(<<https://www.amnesty.org/en/latest>> September 26,2016.

¹⁵⁹ Universal Declaration of Human Rights (adopted 10 December 1948) U NGA Res 217 A (III) (UDHR), art.12; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 23.

¹⁶⁰ Andrew Coyle, *A Human Rights Approach to Prison Management* (London: International Centre for Prison Studies,2009), p.57.

¹⁶¹ Centre on the Death Penalty(n 48), p.37.

the heightened security of death row, which, whilst usually necessary, further ‘add to their feelings of guilt and shame’.¹⁶² It is rightly depicted ‘the families are hidden victims of the crime’.¹⁶³ For some prisoners, the pain and humiliation engendered by such treatment outweigh the pleasure of the visit. The majority of death row prisoners are not allowed physical contact with their families. In this situation, managing visits from family members are emotionally tough for guards, ‘especially when prisoners are banned from touching their visitors and visits take place through glass partitions or nets’.¹⁶⁴ Unrewarding visits thus reflect and reinforce the prisoners’ basic sense of alienation from the world of the living.

Conclusion:

The UN Human Rights Committee, the European Court of Human Rights, Privy Council and courts of various countries including India maintain that the death row phenomenon constitutes cruel and excessive punishment and is a violation of human rights due to an inordinate delay in the execution and hard physical conditions of the detention facility. The exact nature of the doctrine varies among the courts but the underlying concept of death row phenomenon remains the same.

Unlike the judiciary in Pakistan and Bangladesh, the Indian Supreme Court has issued various judgments on the death row phenomenon. Indian Supreme Court recognized death row phenomenon as inhuman and degrading on the basis of delay and on grounds of hard physical conditions. The Courts have provided relief on the basis of inordinate delay treating as ‘supervening circumstance’. In the beginning, the Indian Supreme Court’s stance was closer to that of the Privy Council where excessive time on death row may in itself be sufficient ground for commuting the sentence. The approach of the Indian Supreme Court evolved during the period of time like that of the Human Rights Committee. Unlike the Privy Council and the Human Rights Committee, the Indian Supreme Court starts the clock of delay once the appeal has been rejected by the Supreme Court. In other words, the Indian Supreme Court, in the

¹⁶² Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015), p. 221.

¹⁶³ Susan Sharp, *Hidden Victims: The Effects of the Death Penalty on Families of the Accused* (New Brunswick, NJ, Rutgers University Press, 2005); also see RR Cushing and S Sheffer, *Dignity Denied: The Experience of Murder Victims’ Family Members Who Oppose the Death Penalty* (Cambridge MA, Murder Victims’ Families for Reconciliation, 2002); Samuel R. Gross, and Daniel J. Matheson, ‘What they say at the end: Capital Victims’ Families and the Press’ (2003) 88 *Cornell Law Review* 486.

¹⁶⁴ Walter C. Long & Oliver Robertson, *Prisons Guards and the Death Penalty* (London: Penal Reform International, 2015), p.2.

majority of cases takes into account the executive delay and not the judicial one as a valid ground to commute a death sentence into a life imprisonment.

In these three countries, the death row prisoners are treated as hard core, most dangerous under the logo of discipline, control and silence inherited from prisons system of British Rule in India. To exacerbate the pain of prisoners, colonial masters introduced prisons labor and physical restraints, solitary confinement in cellular prisons or within a prison. To punish the 'guilty of breaches of jail discipline' a range of solitary cells were in operation; in which offenders might be confined in darkness and silence. The Prison Act 1894 authorizes the prison administration to segregate prisoners under the sentence of death and confine them into cells under day and night vigilance. The Supreme Court of India in *Sunil Batra v. Delhi Administration* deliberated Section 30 of the Prisons Act 1894 at length and differentiated the segregation of prisoners under the sentence of death and solitary confinement. The Court did not void Section 30 of the Prison Act 1894 itself but the Court issued directions to alleviate the additional hardships due to segregation of death row prisoners. The Indian Supreme Court observed that prisons administrations were not allowed to keep death row prisoners in conditions of solitary confinement in the name of classification and safekeeping. To preserve his flesh and crush his spirit is not safe keeping. Safekeeping means keeping in his body and mind in fair conditions. The Law Commission of Pakistan indicated that prisoners under the sentence of death should not be confined on death row until confirmation of the death sentence from the respective High Court and that the prisoner be allowed to walk outside the cell without handcuffs. In violation to guidelines of the Indian Supreme Court and the Law Commission of Pakistan, death row prisoners are incarcerated under conditions like solitary confinement.

Death row in India, Pakistan and Bangladesh may be categorized as an unreformed regime that offers unadorned long term solitary or near solitary confinement. Unlike convict prisoners, death row prisoners are not allowed to work inside the facility and they spend twenty-two hours a day in small and cramped cells. They were allowed an hour's walk in the morning, and another hour in the evening with handcuffs. The outdoor recreation takes place in a cage. The daily routine of the death row prisoner is a grinding, dull and redundant. Death row in Indian subcontinent reflects the observation of Robert Johnson: 'On death row the allegorical pound of flesh is just

the beginning. Here the whole person is consumed. The spirit is captured and gradually worn down, then the body is disposed of".¹⁶⁵

Death row prisoners in Pakistan and Bangladesh suffer due to overcrowding in the cells. To perform all activities of daily life with 6 to 9 persons in a cell, not only infringed the right of privacy but also a source of harassment and violent victimization. On the other hand, death row inmates in India complain about solitude and loneliness because death row cells are not overcrowded. The prisoner in the condition of solitary confinement feels buried alive. Life at death row is painful and degrading whether isolated or congregated.

To discharge the duty of safekeeping, custodians of death row are unwilling to tolerate any act that might be interpreted as disobedience to their authority in India, Pakistan and Bangladesh. Even the basic rights of death row inmates are denied: They are allowed restricted family visits, a limited access to recreational and medical facilities. The mental health of death row prisoners is much ignored area and there is little awareness of mental health issues and psychological illness at death row. The mental agony of death row prisoners is intensified in the absence of an effective mechanism of legal aid at the state's expense and they often have little information about the progress of their appeals. The families of the death row prisoners not only face humiliation but also financial stress.

The way forward is not to expedite the process of executions. Commutation is one way to compensate the miseries of life at death row. The death row phenomenon in the Indian subcontinent personifies cruelty of the death penalty apparently and egregiously. The analysis in this chapter strengthens the argument of the dissertation that the use of capital punishment involves abuses of human rights.

¹⁶⁵ Robert Johnson, *Condemned to Die: Life Under Sentence of Death* (New York: Elsevier, 1981), p.121.

Chapter 8

Conclusion

This research concludes that the application of capital punishment in the Indian subcontinent is not only a violation of international human rights law but is also contradictory to the domestic constitutional provisions that guarantee the right to life and the right to a fair trial. This conclusion is based upon the following three arguments: (A) Some provisions of the substantive law of India, Pakistan and Bangladesh that administer capital punishment are not in conformity with the international treaty obligations; (B) Some executions constitute arbitrary deprivations of life in violation of fair trial standards and due process guarantees; and (C) The process by which capital punishment is carried out is inhuman and degrading due to the death row phenomenon and the methods of execution used.

Before identifying the glaring gaps in substantive and procedural laws of these countries that violate the right to life and the prohibition of inhuman and degrading punishment, the thesis gives a historical overview of the criminal justice system in general and capital punishment in particular during three different periods of history including Ancient India, Medieval India and British India. The overview not only helps illuminate common historical similarities in constitutional and statutory texts of the Indian-subcontinent as former British colonies but also traces the origin of the issues that still surround the criminal justice systems of these countries. Firstly, India's sacred texts and the travel accounts of different travelers during the medieval age reveal that capital punishment was not only common throughout the Indian history but also was closely connected to caste and creed.

Secondly, the philosophy of *danda* (rod of punishment) derived from an ancient sacred text, Laws of Manu, is associated with the use of torture to keep man pure and righteous. The philosophy of *danda* provides legitimacy to law enforcement agencies to use torture. Thirdly, it also offers some important insight into the reasons why the British in the nineteenth century discarded the prevalent Muslim law of murder namely *Qisas* قصاص (retaliation) or *Diyyat* دية (blood money) in the Indian subcontinent. Under the law, the right of legal heirs to pardon by taking *Diyyat* (blood money) was meshed with many social and legal complications, for example,

providing easy escape for the powerful and the wealthy. Fourthly, the prison system in the Indian subcontinent, as one of the British colonial legacies, uses prisons labour, physical restraints, solitary confinement in cellular prisons or within a prison as the chief form of punishment. All of which are used to terrorize the wrong-doer.

8.1 Breach of International Treaty Obligations under Substantive Law

As State Parties to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, India, Pakistan and Bangladesh have some obligations regarding the application of capital punishment in their respective jurisdictions. Under international law, treaties are not binding on states unless they choose to be bound. Article 26 of the Vienna Convention on the Law of Treaties states that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’.¹ This includes the rule that a party to a treaty cannot invoke provisions of its domestic law to escape the performance of its treaty obligations.² The Advisory Opinion of Permanent International Court of Justice *in Treatment of Polish Nationals and Other*³ and Article III of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts reinforce the rule that constitutional mandate is not an excuse for a treaty violation.⁴ Amongst the constitutions of the three countries under study, only the Indian Constitution, under Article 51(c), obliges the state to ‘foster respect for international law and treaty obligation’.

8.1 Scope of capital punishment

In accordance with Article 6, Paragraph 2 of the International Covenant on Civil and Political Rights ‘in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes’. In international human rights jurisprudence, the phrase “most serious crimes” has been interpreted as allowing capital punishment to be applied only to the crime of murder or intentional killing. Despite this interpretation of the phrase “most serious crimes” the penal laws of India, Pakistan and Bangladesh prescribe capital punishment for offences not involving

¹ Vienna Convention on the Law of Treaties 1969, Article 26.

² Vienna Convention on the Law of Treaties 1969, Article 27.

³ Permanent Court of International Justice, *Advisory Opinion, Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* (February 4, 1932), p.25

⁴ ILC, ‘Report of the International Law Commission on the Work of its 53rd Session’ (23 April-1 June and 2 July-10 August 2001) UN Doc. A/56/10

intentional killings such as crimes related to terrorism, sex, narcotics, military and religion.

The Human Rights Committee suggests that the offences related to a broad definition of terrorism⁵ and attacks against the internal security of the state⁶ do not fall under the definition of the ‘most serious crimes’. In Pakistan, terrorism related offences that do not result in death of victims include airplane hijacking or assisting a hijacking⁷ and attempt to harm railway passengers such as by explosion or derailment.⁸ In India using any special category of explosives to cause an explosion likely to endanger life or cause serious damage to property is punishable by death.⁹ Under Special Laws of Bangladesh, it is a capital offence to ‘intentionally destroy or damage any property, whether movable or immovable, belonging to the government’¹⁰ and ‘to create, alone or in a group, fear, terror, confusion or anarchy by ostentatiously displaying force or power at any place’.¹¹

The Human Rights Committee has also objected to the imposition of the death penalty for offences related to sex including homosexual act,¹² adultery¹³ and illicit sex¹⁴. India is the latest country that has incorporated non-fatal rape as a capital offence. In this context, under the Criminal Law (Amendment) Act, 2013, repeat offenders of gang rape or rape that causes coma shall be sentenced to death.¹⁵ Under the penal laws of Bangladesh, to commit an offence of rape¹⁶ and ‘to kidnap a child under the age of 10 for the purpose of sexual exploitation’¹⁷ are liable to capital punishment. In Pakistan, sex related capital offences include assault on a woman, intentional display

⁵ UNCHR ‘Comment on Egypt’s Second Periodic Report on Implementation of the ICCPR’ (9 August 1993) UN Doc CCPR/C/79/Add.23, para.8.

⁶ UNCHR ‘Concluding Observations on Togo’s Third Periodic Report on Implementation of the ICCPR’ (28 November 2002) UN Doc CCPR/CO/76/TGO, para.10.

⁷ Pakistan Penal Code (Amended in 2006)1860, sec. 402.

⁸ Pakistan Railways Act 1980(amended in 1996), sec. 127.

⁹ The Explosive Substances (Amendment) Act 2001, sec. 3(b).

¹⁰ Bangladesh Explosive Substances (Amendment) Act 1987, art. 2.

¹¹ Bangladesh Suppression of Terrorist Offences Act 1992, arts. 4, 5.

¹² UNCHR ‘Concluding Observations on Sudan’s Second Periodic Report on Implementation of the ICCPR’ (19 November 1997) UN Doc CCPR/C/79/Add.85, para.8.

¹³ Ibid, para.8.

¹⁴ Ibid, para.8.

¹⁵ Criminal Law (Amendment) Act 2013, sec.9.

¹⁶ Bangladesh Oppression of Women and Children (Special Provisions) Act 1995, art.6.

¹⁷ Bangladesh Penal Code 1860, secs. 364(A), 368.

of her body in a public domain,¹⁸ rape,¹⁹ and abduction of a person to submit an unnatural lust.²⁰

The death penalty for adultery under Pakistan *Hudood* Ordinances may be seriously questioned because the punishment has not been prescribed in the Quran, the primary source of Islamic Jurisprudence. Muslim jurists of the sixth and the seventh centuries developed an Islamic criminal justice system and classified punishments into *Hudood*, *Qisas* and *Tazir*. Under the *Hudood* crimes, the early Muslim jurists categorized adultery as a capital offence. In this context, the Quran prescribes 100 lashes to be punishment for adultery not death by stoning.

To conclude, capital offences related to sex and religion can be abolished from the penal laws of Pakistan in line with international legal framework without violating its constitutional obligations under Article 227 to legislate in accordance with the Quran and Sunnah. Moreover, the Holy Quran mentions three offences namely premeditated murder,²¹ spreading mischief on the earth (*Fasad Fi al Ardh*) and war against God liable to capital punishment. The current list of 27 capital offences is not in conformity with the Quran and the Sunnah.

The Human Rights Committee does not approve that drug offences meet the threshold of the ‘most serious crimes’.²² Affirming the stance of the Committee’ two UN Special *Rapporteurs* on Extrajudicial, Summary or Arbitrary Executions in their respective reports in 1997 and 2007 state that the death penalty should be eliminated for economic and drug related offences.²³ On the contrary, in Pakistan, illegal trafficking of ‘more than one kilogram of a drug is punishable by death’.²⁴ In India, if someone commits an offense related to the ‘production, manufacture, trafficking, or financing of certain types and quantities of narcotic and psychotropic substances, he or she can be sentenced to death’.²⁵ In Bangladesh and Pakistan, capital punishment is

¹⁸ Pakistan Penal Code (Amended in 2006)1860, sec. 354.

¹⁹ Pakistan Penal Code (Amended in 2006)1860, sec.376.

²⁰ Pakistan Penal Code (Amended in 2006)1860, sec. 367-A.

²¹ Al-Quran, 2:178-9.

²² UNCHR ‘Comments on Thailand’s Periodic Report on Implementation of the ICCPR’ (8 July 2005) UN Doc CCPR/CO/84/THA, para.14.

²³ UNCHR ‘Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (1996) UN Doc E/CN.4/1997/60; UNCHR ‘Report of the Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions’ (2007) UN Doc A/HRC/4/20, paras.51-52.

²⁴ The Control of Narcotic Substances Act1997, secs.6- 9

²⁵ Narcotics Drugs and Psychotropic Substances Act of India 1985, Ch. IV, art. 31A.

prescribed for drug possession of 25g²⁶ and 100g²⁷ respectively. Figures released by the Ministry of Interior in the National Assembly of Pakistan in March 2014 indicated that of those sentenced to death, at least 444 persons had been convicted of drug related offences.

8.1.2 Mandatory Death Penalty

Despite the fact that the Supreme Court in *Mithu v. State of Punjab* 1983 found that a mandatory death sentence for murder committed by life-term prisoner while incarcerated to be unconstitutional and arbitrary, the Indian Parliament has since enacted laws that continue to prescribe the mandatory death penalty under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the Narcotics and Psychotropic Substances Act 1985 by amendment in 1989. With the invalidation of, Section 27(3) of the Arms Act and Section 31-A of the Narcotic Drugs and Psychotropic Substance Act of 1985, by the Indian Supreme Court in *Dalbir Singh v. State of Punjab*, 2012 and the Bombay High Court in *Ghulam Muhammad Malik v. Union of India*, 2011, the scope of mandatory death penalty is very much limited. Currently the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989 still has the mandatory death penalty, but only for an extremely class of crime that is virtually never prosecuted: false witness or fabrication of evidence that results in the Execution of an innocent person.²⁸

In Bangladesh, the Supreme Court in *Bangladesh Legal Aid and Services Trust (BLAST)*²⁹ repealed mandatory death sentences for murder by a life-term prisoner (section 303 of the Penal Code), attempted murder by a life-term prisoner (section 307 of the Penal Code) and dowry murder under the Women and Children Repression Prevention Act.³⁰

Unlike India and Bangladesh, in 1992, to affirm the verdict of the Federal Shariat Court³¹ in *Muhammad Ismail Qureshy versus Federation of Pakistan*,³² the

²⁶ The Narcotics Control Act 1990, sec.19.

²⁷ The Control of Narcotics Substances Act 1995, sec. 9

²⁸ Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, No.33 of 1989, India Code (1989), section 2(i)

²⁹ *Bangladesh Legal Aid and Services Trust v. Bangale*. (2010) 30 B.L.D(H.C.D)194.

³⁰ Bangladesh Penal Code of 1860, secs. 303, 307, Women and Children Repression Prevention Act, Sec. 11(ka)

³¹ Article 203-D of the Constitution of Pakistan empowers the court to examine and decide the question, whether or not any law or provision of law is repugnant to the injunctions of Islam.

³² *Muhammad Ismail Qureshy versus Federation of Pakistan*, PLD-1991-FSC-10, para.67

Parliament of Pakistan introduced mandatory capital punishment for the offence of apostasy under Section 295C of the Pakistan Penal Code. Since its enforcement, no one has been executed under this offence but many individuals have been sentenced to death and this law has been frequently misused against religious minorities. Despite the recommendation of the Second Universal Periodic Review, Pakistan has not derogated or repealed the law so far.³³ The mandatory death penalty for the offence of blasphemy is not in line with the international legal framework on capital punishment because it does not leave any option for the judge to consider the mitigating circumstances of the accused.

8.1.3 The Execution of Juveniles

In violations of their treaty obligations under Article 6(5) of the International Covenant on Civil and Political Rights and Article 37(a) of the Convention on the Rights of the Child, the penal laws of India, Pakistan and Bangladesh maintain capital punishment for juvenile offenders below the age of eighteen. The Human Rights Committee, the UN Human Rights Council and the Committee on the Rights of the Child have shown their concern regarding the compliance of these countries to treaty law. Pakistan, as a State Party to the Convention on the Rights of the Child passed the Juvenile Justice System Ordinance 2000 (JJSO 2000) that defines the child as a person below 18 years of age³⁴ and states unequivocally that ‘no child shall be awarded punishment of death’.³⁵ In this context, two major issues need to be addressed: Firstly, the legal status of the law itself because the ordinance was declared null and void by the Lahore High Court in *Farooq Ahmad v. Federation of Pakistan*. The Supreme Court restored the law but the final verdict of the court has been pending since 2005; Secondly, the law is not applicable in all parts of the country namely the Northern Areas and Federally Administered Tribal Areas (FATA).

Contrary to the treaty obligations under the U N Convention on the Rights of the Child, in May 2015, the Indian Parliament amended the Juvenile Justice (Care and Protection of Children) Act 2000, that allows juvenile offenders between the ages of 16 and 18, who are charged with the offences of rape and murder, to be treated as

³³ UNCHR ‘Report of the Working Group on the Universal Periodic Review: Pakistan’ (26 December 2012) UN doc A/HRC/22/12, para.122.

³⁴ Juvenile Justice System Ordinance 2000, sec.2(b).

³⁵ Juvenile Justice System Ordinance 2000, sec.12.

adults. The amendment was introduced against the backdrop of the widespread outrage over the lighter punishment awarded to one of the culprits of the Delhi rape case due to his age, seventeen and a half, at the time of the commission of the crime.

Article 51 of the Children Act 1974 excludes offenders under the age of 16 from the death penalty in Bangladesh. There is no domestic law that fully excludes individuals who are under the age of 18 at the time of the crime. The Committee on the Rights of the Child has repeatedly expressed concern that Bangladeshi law does not clearly preclude the death penalty for offences committed under the age of 18, although Bangladesh asserts that in practice such individuals are not executed.³⁶

8.2 Arbitrary Deprivation of Life in Violation of Fair Trial Standards and Due Process Guarantees

Article 6(1) of the International Covenant on Civil and Political Rights prohibits arbitrary deprivation of life. The United Nations Human Rights Committee has consistently held that the imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 have not been respected, constitutes a violation of the right to life.³⁷ This means that deprivation of life is arbitrary if it is made against the rules of natural justice, due process of law or fair trial standards. The constitutions of India, Pakistan and Bangladesh under Articles 21, 9 and 32 respectively, do not allow the state to take the life except when due process has been adhered to.

The rigorous and frank evaluation of the criminal justice systems in vogue in India, Pakistan and Bangladesh recognizes the following incompatibilities with the rules on due process of law: (i) the use of torture to extract confession; (ii) an ineffective system of legal aid at the state's expense; (iii) issues related to both prosecution and defence witnesses; (iv) counter terrorism and arbitrary application of the death penalty; and (v) discriminatory application of the death penalty under Pakistani law of Qisas and Diyat.

³⁶ Concluding Observations on Bangladesh's Periodic Report on Implementation of the CRC' (27 October 2003) UN Doc CRC/C/15/Add.221, paras.33-34.

³⁷ UNCHR 'General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), para.7 *Carlton Reid v. Jamaica*, (Communication No. 250/1987), UN Doc CCPR/C/39/D/250/1987 (1990), para.11.5; UNCHR 'General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (2007) UN Doc. CCPR/C/GC/32, para.59.

8.2.1 The Use of Torture or Coercion to Extract Confession

Forcing an individual to make or sign, under duress, a confession admitting guilt violates Article 7 (prohibiting torture and inhuman, cruel or degrading treatment), and Article 14, paragraph 3(g) (prohibiting compulsion to testify against oneself or confess guilt) of the International Covenant on Civil and Political Rights, and it also violates Article 15 (statement extracted under torture is not admissible as evidence) of the UN Convention Against Torture (CAT).³⁸

The use of third-degree methods(torture) to extract confessions is not only a historical fact but it is justified by investigating officers for the performance of role obligations. The method of police investigation in the Indian subcontinent is that the investigating officer finds rightly or wrongly his suspect, extorts a confession by the use of third degree and thus proceeds to search for facts to fit the suspect. Thus, investigating officer does not collect evidence but creates it.

In light of the recommendations of the Madras Torture Commission Report of 1855, the Indian Evidence Act 1872 and the Code of Criminal Procedure 1898 provided that all confessions made to the police or by a person in police custody must be inadmissible as evidence. Since the promulgation of the penal laws, this protection proved to be less than a complete remedy and custodial violence or torture is still an integral part of police operations. Non-governmental organizations' reports, decisions by Supreme Courts and High Courts, Reports of Law Commissions, Police Commission Reports and reports of the UN human rights treaty bodies provide an important source of information and allow to gauge the prevalence of torture in these three countries.

The research finds three major reasons for the persistence of police torture to extract evidence. Firstly, the abuse of police power under Section 54 of the Code of Criminal Procedure to arrest without a warrant from the magistrate when there is 'reasonable suspicion' or 'credible information' of the commission of a cognizable offence in nine situations. Besides this power, the Police Act of 1861 (along with the Police Rules of 1934), a colonial legacy that was meant to control people rather than serve them,

³⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entry into force 26 June 1987) UNGA Res 39/46

remained applicable in India, Pakistan and Bangladesh as a central law (with very minor modifications). Even the courts directions on custodial accountability, namely a list of eleven guidelines of the *Indian Supreme Court in D.K. Basu v. West Bengal*, directions of the Lahore High Court in *Khizer Hayat v. the State and Allah Rakhi v. the State*, and the High Court Division of the Bangladesh in *BLAST and others v. Bangladesh*, could not change the deep-rooted practice of police torture to extract confession.

Secondly, Section 27 of the Indian Evidence Act 1872 provides that a suspect's statement to the police is admissible as evidence if it leads to a 'discovery of fact. It is an indirect route that leads to the police's reliance on confession. The Indian Law Commission Report refers to it as the 'fruits here posed no problem'.³⁹ Thirdly, despite the recommendations of these countries' police and law commissions to equip police with necessary gadgets for an effective investigation, police are quite often handicapped in undertaking effective investigation. Owing to a lack of forensic support and the proper training of staff, torture is considered a cheap and effective means to secure a confession.

In the majority of cases, the Supreme Courts and High Courts of India, Pakistan, Bangladesh confirmed the death penalty on the accused who had been convicted by the trial courts solely based on their confessional statements. Evidence obtained as a result of torture, whether the torture generates the 'lead' fatally taints the death penalty trial. This de facto practice of police torture multiplies the risk of prosecuting the weak members of the society where deviance and discrimination are deeply rooted in the socio-political milieu.

8.2.2. Access to Legal Counsel

Failure to comply with treaty obligations under Article 14(3) (e) of the International Covenant on Civil and political Rights and Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, India, Pakistan and Bangladesh could not ensure adequate legal counsel during all stages of capital trials to the indigent. To uphold the principle of equality of arms in criminal proceedings, this right acquires more significance in the context of these developing

³⁹ Law Commission of India, *Review of the Indian Evidence Act, 1872* (Law Com No.185, 2003), p.156.

countries due to higher levels of poverty and socio-economic inequalities. Many are unable to meet their lawyers and are not informed about the status of proceedings. They borrow money or sell their assets like houses, land, jewelry, livestock, or other belongings, to afford private legal representation.

In light of recommendations of the 14th Report of the Law Commission,⁴⁰ India accorded constitutional sanctity to free legal aid in 1976 by incorporating Article 39-A which obligates the state to provide free legal aid by a suitable legislation.⁴¹ To improve the performance of the Legal Services Authorities Act 1987, in 2010, the Indian Government promulgated the National Legal Services Authority Regulations. The Regulations empower the Legal Service Committees of the Supreme Court, High Courts, the Districts and Talukas to specially engage experienced and competent lawyers for the indigent accused in matters where life and liberty are at risk.⁴² It is appreciable that India at least has established an organized aid structure as compared to that of Pakistan and Bangladesh. However, two major challenges hamper the trickling down of the fruit of the legal aid system to the poor facing the charges of capital offences. Firstly, the fee for state's appointed lawyers is not enough to attract the services of competent and experienced lawyers. Secondly, the number of lawyers is not in proportion to the number of indigent accused facing capital charges.

In Pakistan, free legal aid for the weaker segment of society is an even more neglected area. In violation of its constitutional obligations under Article 37(d) (inexpensive and expeditious justice), Article 25, (equality before law), and statutory binding under Section 340 of the Code of Criminal Procedure, there is no comprehensive system for adequate legal aid at the state's expense. Firstly, the laws and rules governing the legal aid system are scattered and not administered by a single body. The three different systems of free legal aid work under the command of three different entities: the High Court, the Pakistan Bar Council and the Law and Justice Commission of Pakistan. Secondly, state appointed counselors are poorly paid. Thirdly, the rules dealing with legal aid in Pakistan lack sufficient details and guidance on the criteria and methods for selecting cases and screening deserving litigants.

⁴⁰ Law Commission of India, *Reforms of Judicial Administration vol. (1)* (Law Com No. 14, 1958), p.595.

⁴¹ The Constitution of India, Article 39-A.

⁴² National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, Regulation 1(15)

Bangladesh is the only country in the region that has made reservations to Article 14(3) (d) of the International Covenant on Civil and Political Rights that the state could not ensure its compliance to provide legal aid due to lack of financial resources. In recognition of the legal aid as a right under Article 27(equal protection of the law) and Article 35(3) (speedy and fair trial) of its constitution, the Government enacted the Legal Service Act 2000 to empower disadvantaged and vulnerable people but it has many shortcomings. The Act does not spell out the procedure for the selection of needy applicants and the financial resources of the District Legal Aid Committee are solely responsible to provide legal aid at the grass roots level. The Supreme Court of Bangladesh Appellate Division in *Bangladesh Legal Aid and Services Trust and others v. State* defended the power of the Superintendent of Jail to prefer appeal as an arrangement of legal aid at the state's expense.⁴³ But the Superintendent of Jail has had no funding at its disposal to engage legal counsels for those who are indigent, this office is authorized to file appeal only. On 8 September, 2015, the Supreme Court Legal Aid Office was established with the collaboration of USAID's Justice for All programme to provide legal aid in both civil and criminal cases. It has an organized structure under the watch of the `Supreme Court but it is too early to evaluate its performance.

8.2.3 Issues Related to Witnesses

Contrary to Article 14(3)(e) of the International Covenant on Civil and Political Rights, India, Pakistan and Bangladesh are unable to facilitate testifying by both defense and prosecution witnesses in an atmosphere free of intimidation. The issues related to witnesses namely, refusing to appear due to fear of reprisal and witnesses turning hostile under threats, intimidation or any inducement incapacitate the interest of justice by causing inordinate delay and providing immunity from prosecution to the powerful. The judgments of Supreme Courts and Reports of Law Commissions in these countries have enumerated it as one of the reasons for the backlog of cases and failure of the criminal justice system to prosecute the powerful and the terrorists.

⁴³ Bangladesh Legal Aid and Services Trust and others v. State, Civil Appeal No.116 of 2010, 5 May, 2015, p. 10.

8.2.4 Counter Terrorism and Arbitrary Application of the Death Penalty

The trial of civilians by military or special courts is not strictly prohibited by the International Covenant on Civil and Political Rights. However, the Human Rights Committee underlines that ‘the trials of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned’.⁴⁴ The Committee further explains that the guarantees of a fair trial cannot be derogated from due to emergency or the special character of the court. Similarly, Security Council Resolutions 1373 and 1456 require appropriate measures to combat terrorism in conformity with international standards of human rights.⁴⁵

Contrary to the international legal framework, the special laws in these three countries to counter different types of terrorism including religious militancy and separation movements lowered the general standards of due process and envisage special powers of arrest and detention; give validity to confessions made under police custody and reverse the presumption of innocence. Since 1985, India has promulgated three main anti-terrorist laws. The incompatibility of the currently enforced special laws with the presumption of innocence transpires clearly from Section 43E of the Unlawful Activities Prevention Act 1967 (UAPA), amended in 2004 and 2008, which empowers the court to presume the accused guilty of terrorism if arms or explosives were recovered from his or her possession.⁴⁶ Moreover, under this law, the accused has to prove his or her innocence when ‘the evidence of the expert including the finger prints of the accused or any other definitive evidence suggesting the involvement of the accused’ is found at the crime scene.⁴⁷

Prior to the current anti-terrorist legislation, the Terrorist and Disruptive Activities (Prevention) Act, 1985 (remained in force until 1995) and the Prevention of Terrorism Act 2002, (remained enforced until 2004), admitted confessions before police officers as evidence, shifted the burden of proof on the accused, and gave the police special powers of arrest and detention. It is ironic that the death sentence of Afzal Guru,

⁴⁴ UNCHR ‘General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’ (2007) UN Doc. CCPR/C/GC/32, para.22.

⁴⁵ UNSC Res1373 (28 September 2001) UN Doc S/RES/1373, para.3(f); UNSC Res 1456 (20 January 2003), UN Doc S/RES/ 1456, para.6

⁴⁶ The Unlawful Activities (Prevention) Amendment Act(UAPA), section 43(E)(a)

⁴⁷ The Unlawful Activities (Prevention) Amendment Act(UAPA), Section 43(E)(a)

charged with complicity and conspiracy in committing an attack on the Indian Parliament in December 2001, was upheld and imposed in February 2013 under TADA which was allowed to lapse in the face of criticism for not respecting fair trial guarantees and amidst widespread allegations of abuse. Similarly, Yaqub Mamon, executed in July 2015, was charged with providing logistic and financial support to a perpetrator of the Bombay bombings in 1993. He was tried under POTA which was repealed because it led to human rights abuses.

Despite the fact that Article 10-A of the Constitution of Pakistan 1973 cites the right to a fair trial as fundamental and inviolable, the special courts and the military courts, which do not meet the threshold of the recognized standards of due process, are empowered to sentence to death on little evidence. In light of the Supreme Court direction given in *Mehram Ali and others v. Federation of Pakistan* the provision that made confessions under police custody admissible as evidence was deleted. However, the Anti-Terrorism Act 1997 still admits the confession as an evidence under police custody under certain conditions. In the name of speedy and effective justice, the Government of Pakistan established courts under the Military Act 1952 amended in 2015 through Constitutional Amendment for a period of two years. The military courts in Pakistan lower the general standards of due process namely to be heard in public by an impartial and independent tribunal. Instead of strengthening the criminal justice system it is a renewed reliance on crude instruments of coercion and military might. In *District Bar Association v. Federation of Pakistan*,⁴⁸ the Supreme Court validated the establishment of military courts, Justice Ejaz Afzal in his dissenting opinion termed military courts as a ‘short cut’ and ‘palliative’ to the problem.⁴⁹

No one including the relatives of the accused were allowed to attend the proceedings of the 11 Military Courts. A precise statement issued by the army press wing is the only source of information regarding the military court proceedings. During the year 2015, military courts concluded the trials of 64 suspects, out of which 36 were sentenced to death and four were given life imprisonment. All of them were convicted on the basis of the confession. The veracity and voluntariness of confessions can be called in question in the absence of an independent review mechanism in military court proceedings. The elicitation and use of such confessions to award capital sentence multiply the risk of arbitrariness under military justice. Similarly, in

⁴⁸ *District Bar Association v Federation of Pakistan*, PLD 2015 SC 401, p.769.

Bangladesh, the special courts established under the Special Powers Act of 1974 and Anti-Terrorism Act of 2009, lower the standards of due process and provide an unaccountable power of arrest to law enforcement agencies.

The dissertation recommends that these three jurisdictions learn from the experience of other countries of the world, especially Sri Lanka and Nepal, who faced far more protracted and deadly insurgencies and acts of terrorism but who never invoked capital punishment to protect national security.

8.2.5 Discriminatory Application of the Death Penalty under Pakistani Law of Qisas and Diyat

The Quran and Sunnah enunciate that the death penalty must not be invoked in an arbitrary and capricious manner in violation of the principle of equality and due process. According to the Quran ‘take not life, which has made sacred, except by way of justice and law’.⁵⁰ This thesis agrees that the Holy Quran prescribes capital punishment for the offence of pre-meditated murder (*qatle amad*). At the same time, the Quran categorically denounces the killing of an innocent person as tantamount to killing the whole humanity and saving a life ‘would be as if he saved the life of the whole people’.⁵¹ That is why the Islamic Criminal Justice System shows concrete concerns over the authenticity of evidence and the legality of pre-trial investigation. The majority of contemporary Muslim jurists support the principles and techniques of avoidance of *Hudood* and *Qisas* penalties through doubts (*Shubhat*) to save the innocent. Moreover, these ideal penalties were considered only by an ideal authority in an egalitarian Muslim society.

In 1990, Pakistan incorporated the Islamic law of murder and bodily harm, abandoned for two hundred years under the British colonial rule in India, to bring the penal laws of the country in accordance with the Quran and Sunnah under the direction of the Federal *Shariat* Court. According to Quranic verses, the compounding of the offence of murder should be voluntary without any element of coercion or pressure of any kind and it must be accompanied by an admission of guilt or assumption of responsibility by the perpetrator.⁵² In fact, the Pakistani version of the Qisas and Diyat Law was grafted into the penal system without taking into account contemporary

⁵⁰ Al Quran, Surah Al-An’am, 6:151.

⁵¹ Al- Quran, Surah Al-Maidah, 5:32.

⁵² Al-Quran, Surah Al Baqara, 2:178-179.

thinking and the social matrix of the society. The amendment had far-reaching consequences for the legal prosecution of homicide. The law privatizes justice by shifting the emphasis from homicide as a crime against the state to a private offence against the victim. The power of legal heirs to enter into a compromise at any stage from investigation to the time of executions has not only marred the process of investigation but also gives an ample opportunity to the powerful and wealthy to coerce the legal heirs to enter into a compromise. The application of the law in the last twenty- five years catalyzed the discriminatory cultural practice of honor killings that is contrary to the tenants of Islam and the spirit of the Constitution of Pakistan.

The research recommends that the application of capital punishment for the offence of pre-meditated murder both as a hadd or Tazir should be avoided due to the persistent occurrences of injustices in Pakistani society as a whole and inherent flaws in the criminal justice system in particular to minimize the risk of implicating the innocent.

8.3 The Application of the Death Penalty is Inhuman and Degrading

8.3.1 The Death Row Phenomenon

The death row phenomenon has been explicitly recognized as a violation of human rights by the UN Human Rights Committee, the European Court of Human Rights, the Privy Council and courts of various countries including India due to the element of delay, the harsh conditions of life on death row or the cumulative effect of both. The exact nature of the doctrine varies among the courts but the underlying concept remains the same. The research has explored the legal and physical problems of one third of the world's death row population who are languishing in cells of overcrowded prisons for years under harsh physical conditions.

In contravention with the directions of the Supreme Court of India in *Sunil Batra v Delhi Administration* and the Law and Justice Commission of Pakistan in its report on Jail Reforms, death row prisoners are segregated under section 30 of the Prison Act 1894 before the confirmation of the death sentence from the respective High Court. The Indian Supreme Court lamented in *Shatrughan Chauhan & Another v. Union of India & Others* about the widespread use of solitary confinement for prisoners on

death row and urged the prison authorities to implement the Sunil Batra decision in its letter and spirit'.⁵³

Incompatibility with the obligations of the state under Article 10(3) of the International Covenant on Civil and Political Rights and Rule 92 of the UN Nelson Mandela Rules for the Treatment of Prisoners, the death row prisoners in the Indian subcontinent are not held for reformation and rehabilitation but categorized as hard core and most dangerous. Unlike the convict prisoners, death row prisoners get a limited access to recreational and rehabilitative activities. The prisoners under the sentence of death are confined in cells segregated from the other prison population and kept under unadorned long term solitary or near solitary confinement. Death cells operate on the "22+ 2" system: 22 hours locked in a cell, followed by 2 hours of recreation out of the cell with hand cuffs.

In the name of safekeeping and discipline, death row prisoners are allowed restricted family visits and a limited access to medical facilities. The mental health of death row prisoners is a much ignored area and both prison administration and the judiciary not only have a little awareness of mental health issues and psychological illnesses but they also do not give due importance. On October 20, 2016, the Supreme Court of Pakistan in *Mst. Safia Bano w/o Imdad Ali v. Government of Punjab, Pakistan*⁵⁴ did not recognize paranoid schizophrenia as a mental disorder and rejected the plea to commute the death sentence on the ground of insanity. The Court followed the suit of *Indian Supreme Court in Amrit Bhushan Gupta v. the Union of India*.⁵⁵ In these three countries, visits are not a matter of right but rather a privilege. The pain of death row is further intensified due to the humiliation of their visitors who have to undergo somewhat degrading checks and searches due to the heightened security of death row. In most of the prisons, the visits take place through glass partitions or nets and prisoners are not allowed physical contact with their families. In fact, death row is the place where fundamental and inviolable rights are constantly denied.

The comparative analysis of death row in these three countries show that death row prisoners in Pakistan and Bangladesh suffer due to overcrowding in the cells. To

⁵³ *Shatrughan Chauhan & Another vs. Union of India & Others*, (2014) 3SCC1, para 91.

⁵⁴ *Mst. Safia Bano w/o Imdad Ali versus Home Department, Government of Punjab, Pakistan*, Civil Petition No.2990 of 2016, para.10.

⁵⁵ *Amrit Bhushan Gupta v. Union of India* (AIR 1977 SC 608).

perform all activities of daily life with 6 to 9 persons in a cell, not only infringes the right of privacy but is also a source of harassment and violent victimization. On the contrary, death row cells in Indian prisons are not overcrowded and inmates suffer from solitude and a long period on death row. In this regard, the longest recorded period of incarceration (death row + trial) was 25 years. The life at death row is painful and degrading whether it is spent isolated or congregated. The period of death row in India is longer than in Pakistan and Bangladesh, but the physical conditions are equally bad in these countries.

Unlike the judiciary in Pakistan and Bangladesh, the Indian Supreme Court has recognized the death row phenomenon as inhuman and degrading and a violation of Article 21(right to life) and Article 14(equality before law) of the Constitution of India on the ground of inordinate delay. Like the Privy Council, the Supreme Court in its various judgments accepted inordinate delay itself as a ‘supervening circumstance’ to commute capital punishment. Unlike the Privy Council and the Human Rights Committee, the Indian Supreme Court starts the clock of delay once the appeal has been rejected by the Supreme Court. In other words, the Indian Supreme Court in the majority of cases takes into account the executive delay and not the judicial delay as a valid ground to commute a death sentence into life imprisonment. It counts the delay, but not the hard physical conditions, as a mitigating factor to commute a death sentence.

To conclude, the death row phenomenon in the Indian subcontinent personifies the cruelty of the death penalty. It strengthens this dissertation’s argument that the use of capital punishment involves human rights abuses.

8.3.2. Methods of Executions

The prohibition of torture under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights protects against aggravated methods of execution such as stoning to death, death on wheel and through being trampled by elephants. In light of its own guideline to carry out the death penalty with ‘the least possible suffering’,⁵⁶ the Human Rights Committee in *Kindler v. Canada* and *Keith Cox v. Canada* arrived at the conclusion that execution by means

⁵⁶ Human Rights Committee, General Comment 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (1994) U.N. Doc. HRI/GEN/1/Rev.1, para.6.

of lethal injection is below the threshold of cruel, inhuman or degrading punishment.⁵⁷

Since the British rule in the Indian Subcontinent, executions are conducted behind the four walls of prisons by hanging as prescribed by the Code of Criminal Procedure 1898. In Pakistan, under the Offence of Zina(Enforcement of *Hudood*) Ordinance,1979, the act of adultery could be punished by stoning to death.⁵⁸ In 2009, Bangladesh Supreme Court ruled that execution by a firing squad was permissible under the constitution. Neither stoning to death nor a firing squad was ever used for execution in Pakistan and Bangladesh respectively.

The Indian Supreme Court in *Deena@ Deena Dayal ETC. v. Union of India*⁵⁹ examined other means of executions such as electrocution, lethal gas, lethal injection, and shooting and concluded that none of these methods had a distinct advantage over hanging which is not a degrading method of execution. In fact, the court endorsed the standpoint of the Royal Commission 1953 that hanging under the drop system as a ‘most humane method of execution’.⁶⁰

In fact, the pain, violence and inhumanity cannot be disassociated from known methods of judicial executions. The torture and horror associated with the process of execution in the Indian subcontinent include executions by prison guards in the absence of a professional executioner, the involvement of other prisoners in rope testing rehearsal using a sand bag of more than the prisoner’s weight, measuring the height and weight of the death row prisoner the day before the execution to find out the drop, and solitary confinement (*kalkothri*) of the condemned prisoner on the issuance of a black warrant. The executions are conducted under a prescribed procedure but the probability of botched executions cannot be ruled out. The instances of botched executions involve inaccuracy of the drop that causes death due to suffocation or decapitation rather than a broken spine, the breaking of the rope and shifting the prisoner to a standby rope. It is rightly said killing with kindness is an oxymoron.

⁵⁷ *Kindler v. Canada* (Communication No. 470/1991), (1993) UN Doc CCPR/C/48/D/470/1991, para 6.8; *Keith Cox v. Canada* (Communication No.539/1993), (1994) UN Doc CCPR/C/57/1, para.17.3

⁵⁸ Offence of Zina (Enforcement of Hudood) Ordinance, 1979, section 4, 5(1), 5(2)(a), 8(b).

⁵⁹ *Deena and Ors. Union of India*, AIR 1983SC 1155.

⁶⁰ Home Office, *Report of Royal Commission on Capital Punishment (1949-53)* (London: Her Majesty’s Stationary Office, 1953), para 703.

Suggested Topics for Future Research:

To conclude the author would like to suggest topics for future research. Mental health of prisoners especially prisoners under the sentence of death is the most neglected area of research in the Indian subcontinent. Empirical research to determine the impact of the death row phenomenon on the mental health of death row prisoners in Pakistan is highly recommended. The empirical research would not only help to gauge the inhuman aspect of the death row but will help the judiciary and prisons administration to achieve more humane treatment.

The second proposed area is empirical research to determine the level of deterrence created by death sentences awarded by military courts and the use of executions to counter suicide terrorism in Pakistan. The study would help establish a relationship between the use of executions and counter-terrorism. The Government of Pakistan can benefit from the outcome of the proposed research to chalk out public policy to counter terrorism.

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